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In The

Supreme Court of the United States

October Term 1997

THOMAS A. WILKINSON, III,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

EDWARD M. CONK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

I. Whether a finding of interstate commerce in a federal money laundering prosecution is a necessary predicate to subject matter jurisdiction under Art. III, § 2.

II. Whether the Fourth Circuit's plain error review was consistent with this Court's precedents and historical practices.

III. Does a defendant's loan of funds obtained through wire fraud to his separate legitimate businesses, or the repayment of that loan, "promote" or "conceal" the predicate crime of wire fraud in violation of the Money Laundering Statute, 18 U.S.C. § 1956(a)(1)(A)(i), (B)(i)?

IV. What is the proper standard of materiality under 18 U.S.C. § 1623 in a prosecution for perjury during a civil deposition, and was there sufficient evidence to satisfy this standard where the Government failed to introduce any evidence about the purpose of the deposition in which Petitioner Conk made the false statement?

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Thomas A. Wilkinson, III, and Edward M. Conk respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., infra, 1-39) is reported at 137 F.3d 214. The judgments of the district court in United States v. Wilkinson (App., infra, 42-49) and United States v. Conk (App., infra, 50-57) are unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 25, 1998. The Court of Appeals denied a timely petition for rehearing on April 17, 1998. See app., infra, 40-41. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix to this petition contains the pertinent parts of the following constitutional and statutory provisions: United States Constitution, Article III, Section 2 (see app., infra, 58); Title 18 of the United States Code, §§ 1623 (see app., infra, 58), 1956 (see app., infra, 59), and 3231 (see app., infra, 60); and Federal Rules of Criminal Procedure 12(b)(2) (see app., infra, 60), 30 (see app., infra, 61), and 52 (see app., infra, 61).

STATEMENT OF THE CASE

I. Factual Background

In 1987, Petitioners Edward M. Conk and Thomas A. Wilkinson III formed Medical Payment Services of Virginia, Inc. ("MPS") to finance the receivables of physicians and other health care providers. See app., infra, 3-4. In the Fall of 1988, MPS entered into a line of credit agreement with Health Line, Inc. ("HLI"), a wholly-owned subsidiary of Blue Cross and Blue Shield of Maryland, that provided that HLI would advance a line of credit of up to five million dollars to MPS. See id. at 4. The agreement further provided that MPS could use the HLI funds only to finance health-care related receivables, (see id.) and required MPS to maintain collateral from such entities.

After MPS secured the line of credit from HLI, it used those funds to finance physicians and other health care providers. However, Petitioners eventually used some of the money to make loans to several of their own non-medical businesses. See app., infra, 4. MPS obtained money from HLI through wire transfers by submitting loan requests (via facsimile) that falsely indicated that the funds requested would be secured by conforming accounts receivable. See id. These wire transfers and facsimile transmissions were the predicates for several counts of wire fraud. See id. Petitioners' loans of funds from MPS to their separate businesses were the predicates for five counts of money laundering (the Promotion Counts). See id.

During the course of business, the Petitioners made repayments of the non-medical loans to MPS and then in turn to HLI. See app., infra, 5. These were the predicates for six additional money laundering counts (the Concealment Counts). See id.

The evidence at trial showed that the loans to the non-medical businesses were recorded in MPS's books under fictitious names that sounded like health care providers. See

app., infra, 4-5. For instance, Hawthorne Construction Excavators, Inc., a construction company owned by Wilkinson, was recorded under the name "Health Emergency, Inc." See id. DayDream Publishing, a corporation in which Conk had an interest, was recorded under the name "American Surgical." See id. at 4. Conk did not testify at trial, but he did testify in an earlier deposition in a civil case that he had never heard of "American Surgical" (see id. at 7). A brief excerpt from this deposition containing this statement was introduced at trial to support the perjury charge. However, the Government did not offer any evidence about the basis for the civil suit or the goal of the deposition to show that the false statement was material.

II. Proceedings Below

Petitioners were tried before a jury in the United States District Court for the Eastern District of Virginia in December 1995. After the close of evidence, the judge instructed the jury on the element of interstate commerce for money laundering:

> It is not necessary for the government to show that the defendants actually intended or anticipated an effect on interstate or foreign commerce by their actions or that commerce was actually affected. All that is necessary is that the natural and probable consequences of the acts the defendants took [sic] would affect interstate or foreign commerce. If you conclude that there would be any effect at all on interstate or foreign commerce, then that is enough to satisfy this particular element. The effect can be minimal.

The judge thus instructed the jury that it only had to find a potential, as opposed to an actual, effect on interstate

commerce. Neither Petitioner objected. However, the Fourth Circuit had previously held, in a similar prosecution under 18 U.S.C. § 1957, that the jury must be instructed to find that the money laundering had an actual, even if de minimis, effect on interstate commerce. See United States v. Aramony, 88 F.3d 1369, 1387 (4th Cir. 1996), cert. denied, 117 S. Ct. 1842 (1997).

Petitioners were convicted of eight counts of wire fraud in violation of 18 U.S.C. § 1343, and nine counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(1) and (B)(1). See app., infra, 42, 44, 50, 52. They were also convicted of one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371 (see id. at 42, 50); the objects of the conspiracy were alleged to be the wire fraud and money laundering. Petitioner Conk was also convicted of one count of bank fraud in violation of 18 U.S.C. § 1344 and one count of perjury in violation of 18 U.S.C. § 1623. See id. at 50, 52.

On appeal, Petitioners challenged their money laundering convictions on the grounds that the transactions that formed the bases of the money laundering counts were not separate and distinct from the specified unlawful activity, i.e. wire fraud. Brief of Appellants at 23. Alternatively, Petitioners challenged their convictions on the Promotion Counts, 18 U.S.C. § 1956(a)(1)(A)(i), on the ground that their transfers of funds to their separate legitimate businesses were "lifestyle expenditures" that did not promote the crime of wire fraud. See app., infra, 10. They challenged their convictions on the Concealment Counts, 18 U.S.C. § 1956(a)(1)(B)(i), on the grounds that the Government did not prove that the transactions involved proceeds of the specified unlawful activity, and that the only activity that amounted to concealment, i.e. the use of false names in the MPS record-keeping, was not a part of the transfer of funds from the separate businesses to the MPS bank account that gave rise to the Concealment Counts. Brief of Appellants at 25-30. The Fourth Circuit dismissed the fact that the transactions

were part of the scheme to defraud as inconsequential, and held that the loans to Petitioners' separate businesses promoted the scheme to defraud because the "scheme" was to misapply funds. See app., infra 10. The court of appeals, reviewing for plain error, also held that the conviction for money laundering was not reversible based on the erroneous jury instruction. See app., infra, 16, 17.

Petitioner Conk challenged his perjury conviction on the grounds that the Government had offered no evidence to show how the false statement in the civil deposition was material. Brief of Appellants at 36-38. While acknowledging a split in the circuits, the Fourth Circuit refused to decide which standard was appropriate because, in its view, the "overwhelming evidence" of materiality met even the more stringent standard. See app., infra, 19, 27. The Fourth Circuit's characterization of this evidence as "overwhelming" is mystifying in light of the government's failure to introduce any evidence about the basis for the civil trial other than the fact that Petitioners were sued by HLI and found personally liable for damages.

III. How the Federal Question Was Presented

The jurisdiction of the district court was invoked under 18 U.S.C. §§ 371, 1343, 1344, 1623, and 1956. However, Petitioners assert the district court's erroneous jury instruction on interstate commerce deprived the district court of jurisdiction over the money laundering counts, 18 U.S.C. § 1956.

REASONS FOR GRANTING THE PETITION

Petitioners ask this Court to grant a Writ of Certiorari to answer four issues, three of which concern their money laundering convictions. The fourth relates to Petitioner Conk's perjury conviction. A determination of these issues will have profound importance in future federal criminal prosecutions. The first money laundering issue concerns whether an erroneous jury instruction on the element of interstate commerce, not objected to at trial, deprived the district court of jurisdiction over the money laundering counts. Petitioners argue that as a consequence of the erroneous jury instruction, their conviction for money laundering is null and void. The second money laundering issue is whether the Fourth Circuit, when reviewing for plain error, misinterpreted prior precedents of this Court. The third money laundering issue concerns the proper construction and application of the money laundering statute. The issue relating to Conk's perjury conviction is whether the Fourth Circuit used the proper standard to determine materiality in a perjury prosecution for statements made in a civil deposition, when the Government presented no evidence of materiality.

This case presents not only an opportunity to correct a split among the courts of appeals, but also to formulate and apply the proper standards for the enforcement of federal criminal law in the federal courts. See McNabb v. United States, 318 U.S. 332, 340-41 (1943). Moreover, the decision below is erroneous, resulting in the violation of the Petitioners' constitutional rights.

I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE A QUESTION OF FIRST IMPRESSION, AN ANSWER TO WHICH WILL PROFOUNDLY SHAPE THE POWER OF THE FEDERAL JUDICIARY: WHETHER, AS A RESULT OF AN INCORRECT JURY INSTRUCTION ON THE ELEMENT OF INTERSTATE COMMERCE, THE DISTRICT COURT WAS WITHOUT JURISDICTION TO SENTENCE THE PETITIONERS. IN THE ALTERNATIVE, EVEN IF THIS COURT SHOULD DECIDE JURISDICTION WAS PROPER, THIS COURT SHOULD GRANT CERTIORARI TO CORRECT THE FOURTH CIRCUIT'S PLAIN ERROR ANALYSIS.

A. The District Court Was Without Subject Matter Jurisdiction When It Sentenced The Petitioners, And As A Consequence, The Petitioners' Sentences Are Null And Void.

No standard governing the scope of appellate review is more frequently applied than the rule that "an error not raised and preserved at trial will not be considered on appeal." WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 27.5, at 1158 (2d. ed. 1988); see FED. R. CRIM. P. 30. However, there exist two general exceptions to the "raise it or waive it" rule: (1) lack of jurisdiction; and (2) plain error. See WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 27.5, at 1159 (2d. ed. 1988); compare FED. R. CRIM. P. 12(b)(2) (defense or objections based on defects in jurisdiction need not be raised prior to trial) with FED. R. CRIM. P. 52(b) (plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.).

As an initial matter, the failure to object to the erroneous interstate commerce jury instruction should not have been reviewed using a plain error analysis.[1] True, plain error generally applies to failure to object to an erroneous jury instruction on direct review. See United States v. Frady, 456 U.S. 152, 163 (1982). But plain error review applies only to rights that have been forfeited. Johnson v. United States, 117 S. Ct. 1544, 1549 (1997); United States v. Olano, 507 U.S. 725, 731 (1993).

This case thus provides the opportunity for this Court to resolve two questions of profound importance in federal criminal prosecutions. The first is whether a finding by a jury of an effect on interstate commerce is necessary to confer federal subject matter jurisdiction upon a Federal District Court. The second is whether jurisdiction may ever be forfeited.

1. A finding of interstate commerce is a necessary predicate of subject matter jurisdiction.

Interstate commerce is related to 18 U.S.C. § 1956 because it is part of the definition of "financial transaction." See 18 U.S.C. § 1956(c)(4)(A). A financial transaction must affect interstate commerce in "any way or degree." See id. Although there remains a lack of authority with respect to the connection between jurisdiction and interstate commerce, one circuit has held, at least in the context of 18 U.S.C. § 1957(a), that interstate commerce must be demonstrated in order to confer subject matter jurisdiction on a federal court. See, e.g., United States v. Trammell, 133 F.3d 1343, 1353

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[1] Subject matter jurisdiction is being raised for the first time in this Court and was not argued below. Nevertheless, an objection to the adjudicatory power of a court may be raised for the first time at any stage of the litigation, including in the Supreme Court. See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 398 (1979).

(10th Cir. 1998); United States v. Kelley, 929 F.2d 582, 586 (10th Cir. 1991), cert. denied, 502 U.S. 926 (1991). Indeed, this answer seems to comport with older federal cases, see, e.g., United States v. Rogers, 23 F. 658 (W.D. Ark. 1885) (jurisdiction is never presumed in a criminal proceeding, but must always be proved), and appears to be in accord with this Court's recent opinion in United States v. Lopez, 514 U.S. 549, 561-62 (1995), where the Court suggested that a case-by-case inquiry is necessary to determine whether jurisdiction based on interstate commerce exists. The theory that a finding of interstate commerce is interrelated to a district court's jurisdiction is in accord with cases from this Court that have held that jurisdiction may be lost if the trial is not conducted consistent with the Sixth Amendment. See Johnson v. Zerbst, 304 U.S. 458, 468 (1938). However, one circuit has held that interstate commerce is not a necessary predicate for subject matter jurisdiction. See United States v. Ryan, 41 F.3d 361, 363 (8th Cir. 1994), cert. denied, 514 U.S. 1082 (1995). Petitioners submit that Ryan merely demonstrates the different understandings of criminal subject matter jurisdiction within the various courts of appeals, and shows precisely why this Court needs to clarify this important area of the law.

Resolution of the ultimate issue, then, turns on the answer to the question of first impression presented here: can a defendant's entitlement to an instruction on the element of interstate commerce, i.e., the very basis for jurisdiction, ever be forfeited? If, as Petitioners urge, it cannot be forfeited, then the Fourth Circuit's plain error review in this case was inappropriate.

2. Just as subject matter jurisdiction cannot be waived, it cannot be forfeited.

Federal courts are courts of limited jurisdiction. Insurance Corp. of Ireland, Ltd. et al. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 701 (1982). Their

subject matter jurisdiction is delineated in Article III, § 2 of the United States Constitution ("Art. III, § 2"). Id. Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction.[2] Id. "Subject matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign." Id. at 702. An objection may be raised at any time during direct review, and may be raised *sua sponte*. See id. This Court has repeatedly noted: "The inexorable command [of Article III] is clear and definite: The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III." Morrison v. Olsen, 487 U.S. 654, 708 (1988) (Scalia, J., dissenting) (alteration in original) (quoting Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58-59 (1982)).

The importance of subject matter jurisdiction is reflected in the consequences of failure to satisfy the subject matter jurisdiction requirements.[3] In the civil context, this Court has held that the validity of a District Court's order depends upon the validity of its subject matter jurisdiction. See id. at 701. In the criminal context, this Court has held that a judgment of conviction pronounced by a court without jurisdiction is void. See Johnson v. Zerbst, 304 U.S. 458,

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[2] The relevant statutory grant of jurisdiction in federal criminal matters is 18 U.S.C. § 3231 which provides that "[t]he district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

[3] The proposition that a judgment of a court lacking jurisdiction was void is embodied in the phrase "coram non judice," which literally means "before a person not a judge." Burnham v. Superior Court of California, 495 U.S. 604, 608-09 (1990). This has been interpreted to mean that the proceeding in question was not a judicial proceeding because lawful judicial authority was not present, and could not render a judgment. See id.

468 (1938); Ex Parte Lange, 85 U.S. 163, 178 (1873). Other than this distinction, the Court has not discussed the differences, if any, between criminal and civil subject matter jurisdiction. Unless the Court addresses this issue, lower courts will continue to use principles of subject matter jurisdiction interchangeably in both contexts.

In addition to a court's power to render a verdict, other legal consequences directly follow from the role Article III, § 2 plays in the Federal judiciary. See Insurance Corp. of Ireland, Ltd., 456 U.S. at 702. It is well understood that no action of the parties can confer subject matter jurisdiction upon a federal court, the consent of the parties is irrelevant, principles of estoppel do not apply, and subject matter jurisdiction cannot be waived.[4] See id. The only issue that has been left unanswered by this Court is whether jurisdiction may be forfeited.

This Court has often recognized that a party may not waive subject matter jurisdiction. Pennsylvania v. Union Gas, 491 U.S. 1, 25 (1989) ("[t]he cases are legion holding that a party may not waive a defect in subject matter jurisdiction ...."), overruled on other grounds by Seminole Indian Tribe of Florida v. Florida, 517 U.S. 44 (1996). While it is true that the most basic rights of criminal defendants are subject to waiver, the Court has assumed, without deciding, that a litigant in the criminal context cannot waive the structural protection of Article III, § 2. See Peretz v. United States, 501 U.S. 923, 937 (1991). This Court has reasoned that notions of consent and waiver cannot be dispositive because the limitations in Article III, § 2 serve institutional interests that the parties cannot be expected to protect. See Commodities Future Trading Commission v. Schor, et al., 478 U.S. 833, 851 (1986). If this is still true, it is hard to think of a principled reason for a different result in the criminal context. Lower courts have clearly assumed

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[4] The only exception that the Court has identified is that principles of res judicata apply to jurisdictional determinations. Insurance Corp. of Ireland, Ltd., 456 U.S. at 702 n. 9.

that the same principles regarding waiver and subject matter jurisdiction also apply in the criminal context. See, e.g., Sealed Appellant v. Sealed Appellee, 130 F.3d 695, 697 (5th Cir. 1997); United States v. Adesida, 129 F.3d 846, 849 (6th Cir. 1997), cert. denied, 118 S. Ct. 1688 (1998); United States v. Navarro, 959 F. Supp. 1273, 1277 (E.D. Cal. 1997).

But the issue of whether jurisdiction may be forfeited is more complicated than it may first appear. This Court has recently held that waiver is different than forfeiture. See Olano, 507 U.S. at 733. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' " Id. quoting Johnson v. Zerbst, 304 U.S. at 464; see also Peter Westen, Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure, 75 MICH. L. REV. 1214, 1254-55 (1977) (In contrast to waiver, forfeiture occurs by operation of law without regard to the defendant's state of mind and is justified by the state's interest in the finality of conviction.).

Although this issue has never been decided by the Supreme Court, Justice Scalia has implied that forfeiture does not apply to jurisdictional claims. Freytag v. Comm'r. of Internal Revenue, 501 U.S. 868, 893-94 (1991) (Scalia, J., concurring). Justice Scalia reasoned that a right that cannot be waived cannot be forfeited (but the converse is not always true). Id. at 895 n.2. Moreover, Justice Scalia, while cautioning that not all structural errors will cause a judgment to be set aside, suggested that a jurisdictional defect may be noticed at any time:

> [S]ince a jurisdictional defect deprives not only the initial court but also the appellate court of its power over the case or controversy, to permit the appellate court to ignore it because of waiver would be to give the waiver legitimating, as opposed to remedial, effect, i.e., the effect of approving,

> ex ante, unlawful action by the appellate court itself.

Id. at 896-97. Thus, if one considers the institutional reasons why subject matter jurisdiction cannot be waived or conferred by any act or omission of the litigants, then it may reasonably follow, *a fortiori*, that subject matter jurisdiction cannot be forfeited. If jurisdiction cannot be forfeited, and if plain error analysis is reserved for forfeited rights, then the Fourth Circuit's review was erroneous.[5] Failure by this Court to take notice of this jurisdictional defect would, as suggested by Justice Scalia's comment above, have the effect of approving, ex ante, the unlawful action of the Fourth Circuit in reviewing for plain error.[6] See id.

In sum, this case presents the opportunity for the Court to answer questions relating to the structure of the judiciary's power under the Constitution, but the absence of a definitive interpretation of Article III § 2 could threaten the finality of convictions throughout the federal criminal system. Because an answer to this question would prevent

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[5] If subject matter jurisdiction cannot be forfeited, the Court may be tempted to review jurisdiction under FED. R. CRIM. P. 52(a) (harmless error) which governs non-forfeited errors. Olano, 507 U.S. at 731. Lower courts that have considered the issue have, however, held that jurisdiction cannot be reviewed using harmless error analysis. See United States v. Navarro, 989 F. Supp. 1273, 1277 (E.D. Cal. 1997). This Court has not yet explicitly so held, but has strongly suggested that jurisdiction cannot be reviewed using harmless error. See Gomez v. United States, 490 U.S. 858, 876 (1989) (magistrate lacks jurisdiction to voir dire felony jury and conviction must be reversed without regard to whether an error was harmless).

[6] If a finding of interstate commerce is necessary to confer subject matter jurisdiction, yet this Court nevertheless believes subject matter jurisdiction may be forfeited and reviewed using plain error analysis, Petitioners submit that subject matter jurisdiction falls within a "special category of forfeited errors" that can be corrected "regardless of their effect on the outcome." See Olano, 507 U.S. at 735. A strict adherence to Johnson's adherence to "overwhelming evidence" standard was thus a reversible error.

any further confusion in the lower courts, the Supreme Court should take this opportunity to definitively resolve this issue. Like venue, jurisdiction is very important in the resolution of criminal trials; both "are matters that touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests." See generally United States v. Johnson, 323 U.S. 273, 276 (1944). This case presents the opportunity to resolve subject matter jurisdiction in the federal criminal context.

B. By Strictly Adhering To Its "Overwhelming Evidence" Standard, The Fourth Circuit Misapplied *Johnson v. United States*, 117 S. Ct. 1544 (1997), And Overlooked This Court's Prior Precedents Including The History Of Plain Error Review.

Federal Rule of Criminal Procedure 52(b) provides a Court of Appeals limited power to correct an error that was forfeited because the error was not timely raised in District Court. Olano, 507 U.S. at 731.[7] The forfeited error "may be noticed" only if it is "plain" and "affect[s] substantial rights." Id. at 732 (alteration in original). "Moreover, Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' " Id. (quoting United States v. Young, 470 U.S. 1, 15 (1985) quoting United States v. Atkinson, 297 U.S. 157 (1936)). Olano held that the standard that should guide the exercise of remedial discretion under Rule 52(b) was articulated in United States v. Atkinson, 297 U.S. 157 (1936). Id. at 736 ("The court of appeals should correct a

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[7] The text provides: "Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." FED. R. CRIM. P. 52(b).

plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' ") (citation omitted).

In Wilkinson, the Fourth Circuit reviewed for plain error, citing United States v. Olano, 507 U.S. 725 (1993). App., infra, 15. It interpreted Olano to hold that plain error review applied to forfeited errors only where: (1) there is an error; (2) the error was plain; (3) the error affects substantial rights; and (4) the court determines, after examining the particulars of the case, that the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Id. (citations omitted).

The Fourth Circuit summarily held that that the first two requirements were met. See id. Since no other instruction encompassed the missing instruction, the Fourth Circuit held that there was no evidence to indicate that the jury made the required finding, and thus, the third prong of Olano was satisfied. App., infra, 16. However, the Fourth Circuit stopped short of concluding that Olano compelled reversal, holding that the forfeited error could not be said to seriously affect the "fairness, integrity, or public reputation of judicial proceedings." Id. The Fourth Circuit relied on Johnson v. United States, 117 S. Ct. 1544 (1997) for its reasoning. Id.

As the Fourth Circuit interpreted Johnson, plain error review is not available when there is error, it is plain, it affects substantial rights, but the fairness and integrity of judicial proceedings have not been compromised. As the Fourth Circuit read Johnson, the fourth prong invites an analysis not of whether the trial was conducted in strict accordance with the law, but of whether the defendant was actually guilty notwithstanding serious defects in the proceedings. Using this approach, the Fourth Circuit held that this was not the appropriate case to correct a forfeited error because there was "overwhelming" evidence of an effect on interstate commerce. App., infra, 17. The Court did not explain how interstate commerce was affected, but

merely pronounced it apparent that there was some such effect.

As discussed above, the Fourth Circuit in Wilkinson concluded that Johnson held that plain error review has four requirements. But this interpretation, if correct, has not always been the way this Court has interpreted the plain error rule. The Court has often discussed two distinct requirements to test the appropriateness of plain error review. The first is a disjunctive test, as provided in the literal language of United States v. Atkinson, 297 U.S. 157 (1936). The second is a conjunctive test, which contains two requirements which must be satisfied before an appellate court may reverse for plain error. This is apparently the interpretation of Johnson and the Fourth Circuit in Wilkinson.[8]

The Supreme Court has historically avoided articulating a strict formula for lower courts to follow in applying the plain error doctrine. See Weems v. United States, 217 U.S. 349, 362 (1910) (describing the plain error rule as "not a rigid one"); see also Engle v. Isaac, 456 U.S. 107, 135 (1982) (characterizing plain error analysis as a "vague inquiry"). Atkinson is the historic test of plain error review in Federal criminal procedure, and was reaffirmed in Olano. See Olano, 507 U.S. at 736. It simply held that "if the errors are obvious, *or* if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings," appellate courts could take notice. Atkinson, 297 U.S. at 160 (1936) (emphasis added). Atkinson was followed for slightly less than half century by the Supreme Court. See, e.g., United States v. Frady, 456 U.S. 152, 163 n. 13 (1982). Frady summed up the underlying rationale of the rule: "Rule 52(b) was intended to afford a means for the

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[8] Petitioners acknowledge that this Court has previously rejected the notion of whether a disjunctive rule exists in plain error review exists. See Olano, 507 U.S. at 732. However, Petitioners submit that an entirely different disjunctive or conjunctive question has arisen, based on how this Court's interpretation of Atkinson has evolved.

prompt redress of miscarriages of justice." Frady, 456 U.S. at 163.

However, the disjunctive test began to evolve into a conjunctive test in United States v. Young, 470 U.S. 1 (1985), which interpreted Atkinson to require that appellate courts find that the claimed error not only seriously affected "substantial rights," but that it had an unfair prejudicial impact on the jury's deliberations. Young, 470 U.S. at 16 n. 14. If the rule were otherwise (if the proper approach were a disjunctive test), appellate courts would indulge in the "pointless exercise of reviewing 'harmless plain errors.' " Id. (citation omitted).

By the time Johnson was decided, this Court interpreted Olano to mean that a serious effect on the fairness, integrity, or public reputation of judicial proceedings was a requirement of plain error review. See Johnson, 117 S. Ct. at 1549. According to the Fourth Circuit, Johnson teaches that evaluation of overwhelming evidence of guilt, combined with the lack of a plausible response, is the test of whether the plain error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." App., infra, 17.

But the Fourth Circuit's strict adherence to Johnson disregards the historical practice underlying plain error review. While any application of plain error doctrine necessarily includes some form of prejudice inquiry, Johnson has produced and will continue to produce more mischief than clarity. See generally United States v. Robinson, 485 U.S. 25, 36 (1988) (Blackmun, J., dissenting). In contrast to collateral review jurisprudence, where "miscarriage of justice" means that the defendant is actually innocent, see Sawyer v. Whitley, 505 U.S. 333, 339-40 (1992), the Court has made it clear that plain error analysis on direct appeal is not limited to cases of actual innocence. Olano, 507 U.S. at 736. Rather, Olano held that "an error may 'seriously affect the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence."

Olano, 507 U.S. at 736-37 (internal quotations omitted). Thus, a strict adherence to Johnson's "overwhelming evidence" standard is inconsistent with the principles of Olano, and the policy underlying plain error analysis.[9] The Court should take this opportunity to explain that Johnson should be read more broadly; if the concern is reversing for "harmless plain error," Johnson should be interpreted as imposing a harmless error rule onto plain error review. In order for the Court to maintain the consistency between harmless and plain error review, a better reading of Johnson is that the plain error involved there was "harmless beyond a reasonable doubt." See Chapman v. California, 386 U.S. 18, 24 (1967). In Chapman, the State of California used an "overwhelming evidence" of guilt standard when reviewing for harmless error to determine whether its state constitutional rule that emphasized whether "a miscarriage of justice" was satisfied. The Supreme Court rejected this approach to constitutional errors as not protective enough. See id. at 23. However, the Fourth Circuit in Wilkinson interpreted Johnson as injecting into plain error review the same sort of "overwhelming" evidence standard rejected by Chapman.

Thus, unless this Court clarifies that Johnson intended to provide "harmless beyond a reasonable doubt" standard, defendants will have more protection when a harmless constitutional error is committed than when a constitutional plain error is committed.[10] Moreover, to require appellate courts to consider whether there is "overwhelming" evidence before granting remand would conflict with the prohibition on trial judges granting a

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[9] Essentially, Petitioners argue that the weight Johnson places on the finality of convictions is particularly out of place when considering whether a court should exercise discretion in correcting a plain error on direct appeal.

[10] This is inconsistent with Olano, where the Court held that the prejudice inquiry is basically the same under both subsections of FED. R. CRIM. P. 52. See generally Olano, 507 U.S. at 734.

directed verdict against a defendant despite "overwhelming evidence" of guilt. See Sullivan v. Louisiana, 508 U.S. 275, 277 (1993). In order to resolve any inconsistency, the Supreme Court should clarify the prejudice standard under Johnson to be "harmless beyond a reasonable doubt." While a test of "beyond a reasonable doubt" is still inconsistent with Olano's teaching that the Rule 52(b) has nothing to do with actual innocence, clarification of the standard would at least correct the paradox that has been created.

Johnson also left unclear whether the "overwhelming evidence" standard is the only test that may be used by a lower court to determine whether the plain error "seriously affect[s] the fairness, integrity, or public reputation" of the judicial proceedings. See generally Johnson, 117 S. Ct. at 1550. Johnson's "overwhelming" evidence standard is not only a poor test for use in all circumstances, but is being applied differently in various situations. See, e.g., United States v. Martinez-Rios, et al., No. 97-1021 1998 U.S. App. LEXIS 9445, at *40-41 (2d Cir. May 4, 1998) (an arithmetic error in the course of sentencing that was not objected to was the sort of error that "seriously affects the fairness, integrity, or public reputation of judicial proceedings;" Johnson's "overwhelming" evidence inquiry not performed). If the so-called "fourth prong" has historically been left to the discretion of the appellate courts, query whether it makes sense to impose a single mandatory test on lower courts before they may exercise their discretion.

In sum, this case presents the Court with an opportunity to provide the courts of appeals with some much needed guidance regarding the circumstances in which discretion may be exercised. As Justice Blackmun's observed in his dissent in Robinson:

> To clear the confusion reflected in [Young], this Court should either continue on the path it started down in Young and formulate a test for plain error that articulates the prejudice

> standard to be applied, or in the alternative, it should make clear, by reasserting the plain-error doctrine's lack of rigid definition, that its language in Young is not to be interpreted as a test. This latter course may be more true to the doctrine's purpose of allowing courts to single out the rare case in which allowing a conviction to stand would severely undermine the "fairness, integrity or public reputation of judicial proceedings."

Robinson, 485 U.S. 25, 36-37 (Blackmun, J., dissenting) (internal citation omitted).

II. THIS COURT SHOULD GRANT CERTIORARI TO SETTLE A DISAGREEMENT AMONG THE CIRCUITS WITH REGARD TO THE APPLICATION OF THE MONEY LAUNDERING STATUTE AND CORRECT THE FOURTH CIRCUIT'S ERRONEOUS APPLICATION OF THAT STATUTE.

A. The Fourth Circuit's Holding That Petitioners' Transfers Of Funds To Their Separate Legitimate Businesses Promoted The Specified Unlawful Activity Conflicts In Principle With The Decisions Of The Seventh And Tenth Circuits.

The Court of Appeals' holding that the Petitioners' transfers of funds to their separate legitimate businesses "promoted" the specified unlawful activity conflicts with the principles announced in other circuits. Several circuits have recognized that simply using proceeds from a specified unlawful activity for what have been termed "lifestyle expenditures" does not "promote the carrying on of [a] specified unlawful activity" within the meaning of section

1956. 18 U.S.C. § 1956(a)(1)(A)(i) (emphasis added); see United States v. Jackson, 935 F.2d 832, 841 (7th Cir. 1991); see also United States v. Torres, 53 F.3d 1129, 1138-39 (10th Cir.) (reversing money laundering conviction based on transfer of funds for purchase of car, while affirming conviction based on use of transferred funds to buy more drugs for sale), cert. denied sub nom Aflleje-Torres v. United States, 515 U.S. 1152, and cert. denied sub nom Aflleje v. United States, 516 U.S. 883 (1995). In Jackson, the Seventh Circuit held that a drug dealer's use of drug money to pay his rent and his cellular phone bill did not constitute promotion because it did not further the predicate crime. Id. at 841. A person commits wire fraud if, with the requisite intent, he uses a wire transmission to further a "scheme to defraud."

In the case sub judice, the Petitioners were convicted of money laundering under § 1956(a)(1)(A)(i) on the theory that their loans to separate legitimate businesses advanced the scheme to defraud that was a part of the wire fraud. However, the Jackson Court sensibly recognized that not every transaction that involves the proceeds of the specified unlawful activity promotes the "carrying on" of that activity. Likewise, in United States v. Sanders, 928 F.2d 940 (10th Cir.), cert. denied, 502 U.S. 845 (1991), the Tenth Circuit rejected the argument that the money laundering statute should reach all transactions that involve proceeds of the specified unlawful activity, cautioning that "to so interpret the statute would . . . turn the money laundering statute into a 'money spending statute.'" Id. at 946.

The Fourth Circuit is not alone in its expansive interpretation of "promotion" under § 1956(a)(1)(A)(i). In United States v. Montoya, 945 F.2d 1068, 1076 (9th Cir. 1991), the Ninth Circuit found that defendant's act of depositing the proceeds of a bribery transaction into his personal checking account promoted the specified unlawful activity, i.e., the bribery transaction. If left uncorrected, Montoya and the case sub judice threaten to turn the money laundering statute into a "money spending statute," a result

which other circuits have prudently avoided. See Sanders, 928 F.2d at 946.

B. This Court Should Clarify And Limit The Reach Of The Money Laundering Statute.

This Court should grant certiorari in order to correct the Fourth Circuit's erroneous application of the federal money laundering statute, 18 U.S.C. § 1956. As this statute is increasingly applied to "white collar" crimes like wire fraud, see Robert G. Morvillo & Barry A Bohrer, Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation, 32 AM. CRIM. L. REV. 137, 145 (1995) (citing study that found forty percent of the crimes for which money laundering sentences were imposed were "white collar" crimes unrelated to drug trafficking), lower courts would benefit from this Court's guidance on how to apply the money laundering statute in these cases. See also U.S.S.C., REPORT TO CONGRESS: SENTENCING POLICY FOR MONEY LAUNDERING OFFENSES, INCLUDING COMMENTS ON DOJ REPORT, 6-7 (Sept. 18, 1997) ("[T]he [United States Sentencing] Commission continues to see money laundering sentences imposed where the money laundering conduct is so attenuated as to be virtually unrecognizable as the type of conduct for which the original money laundering sentencing guidelines were drafted").

1. Transactions that are a part of the "scheme to defraud" cannot support a conviction for money laundering because those transactions are part of the predicate crime of wire fraud itself.

Petitioners' loans to their other businesses cannot constitute § 1956 money laundering because those transfers formed a part of the predicate crime. One of the necessary elements of wire fraud is a "scheme to defraud." See 18

U.S.C. § 1343. Specifically, the wire transmission must be made "for the purpose of executing such scheme or artifice." See id. The problem with construing § 1956 broadly when it is based on the predicate crime of wire fraud is that transactions which are a part of the scheme to defraud can always be viewed as either promoting or concealing that scheme. Cf. United States v. Sawyer, 799 F.2d 1494, 1502 (11th Cir. 1986) ("Fraudulent conduct that will establish a 'scheme to defraud' includes knowingly making false representations or concealing material facts" (internal citations omitted)), cert. denied sub nom Leavitt v. United States, 479 U.S. 1069 (1987). Under the construction urged by the Government and adopted by the Fourth Circuit, the very transactions that constitute a "scheme to defraud" for the purpose of demonstrating wire fraud themselves constitute money laundering. This construction must be rejected because, contrary to the intent of Congress, it punishes defendants twice for the same activity. See United States v. Edgmon, 952 F.2d 1206, 1213 (10th Cir. 1991) ("Congress appears to have intended the money laundering statute to be a separate crime distinct from the underlying offense that generated the money to be laundered"), cert. denied, 505 U.S. 1223 (1992).

2. The plain language of the money laundering statute requires the Government to prove that the transactions involved the proceeds of specified unlawful activity; it cannot assume that payments made from an account involved such proceeds simply because proceeds had previously been commingled with other funds in that account.

Under § 1956(a)(1)(B), the Government is required to prove that the defendant knew that the "property"

involved in the financial transaction at issue represented the proceeds of the specified unlawful activity. In this case, the Government relied on repayments from the Petitioners' separate legitimate businesses back to MPS. Although the Government demonstrated that proceeds from the wire fraud had previously been transferred from MPS to the businesses, it offered no proof that the funds repaid to MPS were the same funds that MPS had transferred in the first instance. Each of the transferors had many other sources of income during the months between their receipt of funds from MPS and their repayment of those funds, income which far exceeded the amount of the transfers alleged to constitute money laundering. See Brief of Appellants at 27. This Court should grant certiorari to correct the erroneous interpretation of § 1956(a)(1)(B) that the Fourth Circuit and numerous other circuits have adopted.

The Seventh and Tenth Circuits have said that "it will be a rare case in which [the design] requirement[ ] will be satisfied without proof that the funds used in the charged transaction were derived in substantial measure from 'specified unlawful activities' rather than some other legal or illegal conduct." United States v. Garcia-Emanuel, 14 F.3d 1469, 1475 (10th Cir. 1994) (alterations in original) (quoting Jackson, 935 F.2d at 840). This is consistent with the plain language of the statute, which provides that the accused transaction must "*in fact involve*[ ] the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1) (emphasis added). Several circuits have relaxed this clear statutory requirement when the proceeds of specified unlawful activity are commingled with other legally acquired funds, reasoning that to apply this statute as it is written would permit criminals to escape a § 1956(a)(1)(B) money laundering conviction by simply commingling illegally obtained funds with legally obtained funds. However, it is up to Congress to rewrite the statute, not to the circuit courts. "Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so . . . ." Brogan v.

United States, 118 S. Ct. 805, 811-12 (1998); see also United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms" (internal quotations omitted)); United States v. Wiltberger, 5 Wheat. 76, 96, 5 L. Ed. 37 (1820) ("The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest"), quoted in Bouie v. City of Columbia, 378 U.S. 347, 362-63 (1964).

3. The plain language of § 1956(a)(1)(B)(i) only criminalizes "financial transactions" that are designed to conceal the proceeds of specified unlawful activity; it does not reach the making of records about the transaction.

To be convicted under § 1956(a)(1)(B)(i), the Government also had to prove that Petitioners "conduct[ed] . . . a financial transaction . . . knowing that the financial transaction is designed in whole or in part . . . to conceal or disguise the nature, the location, the source the ownership, or the control of the proceeds of specified unlawful activity . . . ." Petitioners' convictions on the concealment counts rest on the fact that their separate legal businesses were given false names in MPS's books. The Fourth Circuit held that the transfer of money from Petitioners' separate legitimate businesses to the MPS bank account amounted to concealment because the jury could infer that Petitioners would not have engaged in these transactions but for the knowledge that MPS would doctor the books. See app., infra, 14.

The Fourth Circuit's holding takes an overly broad view of the term "transaction." Section 1956 defines "transaction," in pertinent part, as including "a transfer,

delivery, or other disposition, and with respect to a financial institution includes a deposit, . . . transfer between accounts, . . . or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected." 18 U.S.C. § 1956(c)(3). The plain meaning of the statute limits the meaning of "transaction" to transfers of property. Although the transfer of funds was a "transaction," the doctoring of the books was not a transaction or a part of a transaction as that term is defined by § 1956(c)(3) because it involved no transfer of property. Indeed, the "financial transaction" in each instance would have been precisely the same had it been described accurately in MPS's books – or had it not been described at all.

Congress's intent to limit the definition of "transaction" to those set forth in the text is clear and should not be expanded by the courts. See United States v. Bell, 936 F.2d 337, 341 (7th Cir. 1991). The falsifications in MPS's internal accounting records at worst suggest that Petitioner attempted to mislead HLI as part of the scheme to defraud. See United States v. Napoli, 54 F.3d 63, 68-69 (2d Cir. 1995). That may be fraudulent, but it is not money laundering.

III. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT IN THE CIRCUITS OVER THE PROPER STANDARD OF MATERIALITY IN A PROSECUTION FOR PERJURY DURING A CIVIL DEPOSITION, AND VACATE PETITIONER CONK'S CONVICTION FOR LACK OF ANY EVIDENCE OF MATERIALITY.

A. The Circuits Are Divided Over The Proper Standard Of Materiality Under The Perjury Statute As It Applies To False Statements Made In Civil Depositions.

In its opinion, the Fourth Circuit observed that the circuits are split over the proper materiality standard in the context of civil depositions. See app., infra, 19. In the Second Circuit, a false statement in a civil deposition is material if a "truthful answer might reasonably be calculated to lead to the discovery of evidence admissible at the trial of the underlying suit." See United States v. Kross, 14 F.3d 751, 754 (2d Cir.), cert. denied, 513 U.S. 828 (1994), cited in app., infra, 19. The Fifth Circuit has adopted a similar standard. See app., infra, 19 (citing United States v. Holley, 942 F.2d 916, 923 (5th Cir. 1991)). However, the standard is considerably higher in the Sixth and Ninth Circuits. See app., infra, 19. In these circuits, such a false statement is material if the topic of the statement is discoverable and the statement itself tended to affect the outcome of the civil suit for which the deposition was taken. See United States v. Clark, 918 F.2d 843, 846 (9th Cir. 1990), overruled on other grounds by United States v. Keys, 95 F.3d 874, 878 (9th Cir. 1996), cert. granted and judgment vacated, 117 S. Ct. 1816 (1997); United States v. Adams, 870 F.2d 1140, 1146-48 (6th Cir. 1989). The Fourth Circuit declined to consider which standard was appropriate because it found that Conk's false statement was material even under the more stringent

standard of the Sixth and Ninth Circuits. See app., infra, 27. This result is troubling in light of the Government's failure to introduce any evidence about the civil case for which the deposition was taken and the Fourth Circuit's failure to determine an appropriate standard for materiality. In light of the potential significance of this issue, this Court should take this opportunity to determine the appropriate standard of materiality for perjury cases in the context of civil depositions.

B. Petitioner Conk's Perjury Conviction Must Be Vacated Because No Evidence Was Presented To Show That The False Statements Were Material Under Any Standard.

Petitioner Conk was convicted of one count of perjury in violation of 18 U.S.C. § 1623 for allegedly making a false statement in a deposition in a civil case. The count alleged that Petitioner lied when he denied knowing that "American Surgical" was the false name used in MPS records to refer to DayDream Publishing. In order to convict Conk of perjury, the prosecution was required to prove that he knew that he was making a false statement, and that the falsity was material. See 18 U.S.C. § 1623. This conviction should be reversed because the prosecution did not introduce any evidence as to materiality.

This Court does not ordinarily grant certiorari to "review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). However, where, as here, there is an utter lack of evidence to support a conviction, the Court has granted certiorari to consider whether such a baseless conviction comports with the Due Process Clause. See, e.g., Garner v. Louisiana, 368 U.S. 157, 163-64 (1961); Thompson v. City of Louisville, 362 U.S. 199 (1960) (stating that this question "turns not on the sufficiency of the evidence, but on whether this conviction

rests upon any evidence at all"); see also Washington v. United States, 357 U.S. 348 (1958) (reversing a federal conviction "because of the insufficiency of the evidence"). Petitioner's perjury conviction should be vacated because the prosecution did not introduce evidence to prove materiality.

"Deciding whether a statement is 'material'," this Court has noted, "requires the determination of at least two subsidiary questions of purely historical fact: (a) 'what statement was made?'; and (b) 'what decision was the agency trying to make?'" United States v. Gaudin, 515 U.S. 506, 512 (1995). In this case, the Government offered proof of (a), but offered no evidence whatsoever of (b). Therefore, the evidence adduced could not support the required finding of materiality.

The Government did not call a single witness to testify about the purpose of the civil suit that involved the deposition in which Petitioner Conk made the allegedly false statement. Nor did the Government call any witnesses to testify about the nature of the inquiry at the deposition or the effects that Conk's answer might have had on the proceedings.[11] It did not introduce the complaint or any other document that showed what HLI was seeking in its civil suit. In short, there was nothing in the record (save argument) from which a reasonable jury could determine the context in which Petitioner Conk's statement was made, and, therefore, whether it had the "tendency to influence" or was "capable of influencing" the person making the inquiry. United States v. Littleton, 76 F.3d 614, 618 (4th Cir. 1996).

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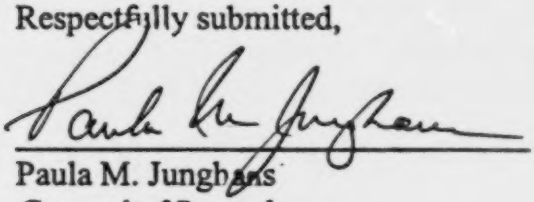
[11] Only two Government witnesses testified in any way about litigation between HLI and MPS or the defendants. Both testified only in generalities to the effect that there was litigation, a judgment and a settlement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

October Term 1997

THOMAS A. WILKINSON, III,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

EDWARD M. CONK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Appendix to Petition for Writ of Certiorari

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PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THOMAS A. WILKINSON, III,
Defendant-Appellant.

No. 96-4530

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EDWARD M. CONK,
Defendant-Appellant.

No. 95-4556

Appeals from the United States District Court
for the Eastern District of Virginia, at Richmond.
Robert R. Merhige, Jr., Senior District Judge.
(CR-95-68)

Argued: October 2, 1997
Decided: February 25, 1998
[Entered: February 25, 1998]

Before WIDENER, NIEMEYER, and HAMILTON,
Circuit Judges.

Affirmed by published opinion. Judge Hamilton wrote the opinion. Judge Widener wrote a separate opinion concurring in part and dissenting in part. Judge Niemeyer wrote a separate opinion concurring in part and dissenting in part. Judge Hamilton also wrote a separate opinion, with respect to Part VI.

COUNSEL

ARGUED: Paula Marie Junghans, MARTIN, JUNGHANS, SNYDER & BERNSTEIN, P.A., Baltimore, Maryland, for Appellants. David T. Maguire, Assistant United States Attorney, Richmond, Virginia, for Appellee. **ON BRIEF:** Gerald T. Zerkin, GERALD T. ZERKIN & ASSOCIATES, Richmond, Virginia, for Appellant Wilkinson. Helen F. Fahey, United States Attorney, Andrew G. McBride, Assistant United States Attorney, William L. Finch, Department of Justice Trial Attorney, Richmond, Virginia, for Appellee.

OPINION

HAMILTON, Circuit Judge:

Thomas Wilkinson, III (Wilkinson) and Edward Conk (Conk) (collectively the Defendants) appeal their convictions and sentences following a jury trial on conspiracy charges, money laundering charges, and various related fraud charges, including wire fraud and bank fraud, stemming from their operation of a company purportedly in the business of financing the accounts receivable of physicians. Conk was also convicted on one count of perjury.

With respect to their money laundering convictions, the Defendants seek reversal on two grounds: (1) the district

court committed plain error under Federal Rule of Criminal Procedure 52(b) by failing to instruct the jury that the government had to prove an interstate commerce nexus, and (2) the evidence is insufficient to support the jury's findings as to several essential elements. Conk seeks reversal of his perjury conviction on two grounds: (1) the district court committed plain error by instructing the jury on the wrong perjury statute, and (2) the district court committed plain error by removing the element of materiality from the jury. Conk seeks reversal of his bank fraud conviction on the basis of insufficiency of the evidence. The Defendants both seek reversal of their conspiracy and wire fraud convictions on the ground that the district court erroneously admitted two portions of a summary chart exhibit known as "Exhibit MF-4." Finally, the Defendants challenge their sentences on two grounds: (1) the district court committed error by refusing to grant them downward departures in their sentences, and (2) the district court failed to make specific findings with respect to its application of the United States Sentencing Guidelines to some of their convictions. For reasons that follow, we affirm the Defendants' convictions and sentences.

I.

Because the Defendants challenge the sufficiency of the evidence on numerous counts for which they were convicted, we present the facts in the light most favorable to the government, drawing all reasonable inferences in its favor. See United States v. Burgos, 94 F.3d 849, 862 (4th Cir. 1996), cert. denied, 117 S. Ct. 1087 (1997). The evidence at trial focused on the Defendants' operation of Medical Payment Systems, Inc. (MPS) in Richmond, Virginia, primarily from the fall of 1988 to the summer of 1991. The Defendants, who were both educated and experienced businessmen, started MPS in the fall of 1988 with the purported objective of lending money to physicians

in exchange for a perfected security interest in the physicians' accounts receivable.

To fund this purported objective, the Defendants borrowed money from a Maryland company named Health Line, Inc. (HLI), a subsidiary of Blue Cross Blue Shield of Maryland. Based on representations by the Defendants that MPS was in the business of financing the accounts receivable of physicians, HLI granted MPS a five million dollar line of credit in November 1988. The written loan agreement between MPS and HLI specified that MPS could only use draws on the line of credit to make loans to physicians and that the loans had to be secured by security interests in the accounts receivable of those physicians.

The evidence at trial showed that at the time the Defendants secured the line of credit from HLI, the Defendants intended to use most of the money to fund several of their own separate non-medical businesses that were in poor financial health. The Defendants acted on their illicit intent, ultimately obtaining in excess of three million dollars from HLI through wire transfers by submitting dummy loan requests to HLI via facsimile. The dummy loan requests falsely showed that the funds requested would be secured by certain accounts receivable of particular physicians. These wire transfers and facsimile transmissions were the predicates for seven counts of wire fraud. See 18 U.S.C. § 1343. The Defendants' transfers of line of credit funds through MPS to their separate businesses were the predicates for five counts of money laundering (the Promotion Counts). See 18 U.S.C. § 1956(a)(1)(A)(i).

In order to conceal their fraudulent scheme on MPS's accounting records, the Defendants gave their separate non-medical businesses bogus names that sounded like the names of actual medical practices. For example, the Defendants gave Day Dream Publishing Company (Day Dream Publishing) the name "American Surgical, Inc." Conk was a substantial part owner of Day Dream Publishing, which was headquartered in California. For a second

example, the Defendants gave Hawthorne Construction Excavators, Inc. the name "Health Emergency, Inc." Hawthorne Construction Excavators, Inc. was a Virginia construction company owned by Wilkinson.

By December 1989, the Defendants had nearly exhausted the five million dollar line of credit, and, under the terms of the loan agreement, MPS needed to make substantial interest payments. Thus, in order to continue to promote their scheme to defraud, the Defendants caused their various separate businesses to transfer funds into MPS's bank account at Sovran Bank in Richmond, Virginia. MPS would then use the money to make interest payments to HLI. The transfers from the separate businesses to MPS's account at Sovran Bank were the predicates for six additional money laundering counts (the Concealment Counts). See 18 U.S.C. § 1956(a)(1)(B)(i).

Conk was charged with one count of bank fraud premised on the following facts and circumstances. See 18 U.S.C. § 1344. Conk managed Day Dream Publishing directly and through his son, Chip Conk. The company began having cash flow problems in the latter part of 1988. By early March 1989, the cash flow problems had not improved and, as a result, the Defendants funneled $80,000 from MPS to Day Dream Publishing.

On March 27, 1989, the Bank of Montecito, a federally insured bank in the State of California, extended credit to Day Dream Publishing in the amount of 1.65 million dollars through a line of credit evidenced by a note (the Note). The Note had an expiration date of May 1, 1989. The Note was secured by a blanket but revolving security interest in all of Day Dream Publishing's property, including purchase orders, accounts receivable, and the proceeds thereof. The terms of the agreement creating the blanket security interest provided that Day Dream Publishing would not, without the prior written consent of the Bank of Montecito, encumber or otherwise dispose of any collateral or any interest in the collateral. The Bank of Montecito did

not bear the entire risk of loss on the Note, because a man named Mr. Tobes purchased half of the Note from the Bank of Montecito.

May 1, 1989 came and went without Day Dream Publishing satisfying the Note. The Bank of Montecito, however, did not call the loan in hopes of repayment in the near future. The Bank of Montecito continued to monitor the financial health of Day Dream Publishing by reviewing the financial reports submitted by Day Dream Publishing.

In August 1989, Day Dream Publishing landed a large purchase order from the Big B drug store chain to print calendars containing coupons. Unfortunately, Day Dream Publishing did not have sufficient funds to pay for the design and production of the order. Conk came to the rescue by borrowing an additional $316,000 for Day Dream Publishing from MPS, $116,000 of which went from MPS's account with Sovran Bank straight to the printer that Day Dream Publishing had hired to print the calendars. In early September 1989, the Bank of Montecito expressly extended the maturity date of the Note to January 3, 1990.

After receiving the calendars, Big B issued Day Dream Publishing a check, dated November 15, 1989, for $410,425.56 as payment for the calendars. Rather than depositing the check into Day Dream Publishing's account, Conk caused Day Dream Publishing's comptroller to endorse the check in favor of MPS as repayment on the loans from MPS. Conk did not obtain permission from the Bank of Montecito to divert the proceeds of the Big B account receivable to MPS or otherwise inform the Bank of Montecito that it was in receipt of the "Big B check." Day Dream Publishing eventually paid the Note in full.[1]

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[1] Approximately during the same time that the Bank of Montecito extended Day Dream Publishing the 1.65 million dollar line of credit, the Bank of Montecito also extended Day Dream Publishing an $850,000 line of credit. Unlike the 1.65 million dollar line of credit, which involved a blanket security interest in Day Dream Publishing's inventory, accounts receivable, and the proceeds thereof, the $850,000 line of credit

Turning back to HLI's relationship with MPS, in December 1990, HLI hired an outside auditing firm to evaluate the integrity of its collateral. HLI took this step only after it tried for several months without success to obtain certain information from MPS regarding the condition of its collateral. The Defendants stonewalled the efforts of the auditing firm by refusing it access to MPS's books and records. HLI became suspicious and called the loan approximately six months later. When MPS failed to satisfy the outstanding amount of the loan, HLI filed a civil suit against MPS and the Defendants in the United States District Court for the Eastern District of Virginia. During a deposition in that case, Conk falsely denied knowledge that "American Surgical" was the fictitious name used in MPS's books for Day Dream Publishing. This statement was the subject of the count of perjury against Conk. HLI ultimately obtained a 5.3 million dollar judgment against MPS and the Defendants in July 1991.

On June 21, 1995, a federal grand jury in the United States District Court for the Eastern District of Virginia returned a twenty-four count indictment against the Defendants. Count 1 charged the Defendants with conspiracy to defraud the United States in violation of 18 U.S.C. § 371. Counts 2 through 10 charged the Defendants with wire fraud in violation of 18 U.S.C. § 1341. Count 11 charged Conk with bank fraud in violation of 18 U.S.C. § 1344. Counts 12 through 17 charged the Defendants with laundering money with the intent to promote the carrying on of wire fraud in violation of 18 U.S.C. § 1956(a)(1)(A)(i). Counts 18 through 23 charged the Defendants with laundering money with the

---

was secured by specifically identified accounts receivable of Day Dream Publishing. The subjects of the specifically identified accounts receivable were to pay the Bank of Montecito directly. We can find no evidence in the record to establish that the Big B account receivable was one of the accounts receivable connected to the $850,000 line of credit.

knowledge that the transactions were designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the proceeds involved in violation of 18 U.S.C. § 1956(a)(1)(B)(i). Count 24 charged Conk with perjury in violation of 18 U.S.C. § 1623.

A jury acquitted Wilkinson and Conk on Counts 10, 15, 22, and 23 and convicted them on the remaining counts. At sentencing, the Defendants sought downward departures in their sentences on the ground that the facts establishing their wire fraud convictions supplied the basis for their money laundering convictions. The district court refused to grant the Defendants downward departures, sentencing Wilkinson to 87 months' imprisonment and Conk to 99 months' imprisonment. The district court also ordered that the Defendants were joint and severally liable for $1,662,658 in restitution. The Defendants noted a timely appeal.

II.

The Defendants first challenge the sufficiency of the evidence to support their money laundering convictions under 18 U.S.C. §§ 1956(a)(1)(A)(i) and 1956(a)(1)(B)(i). We must sustain these convictions if there is substantial evidence to support them when the evidence and reasonable inferences from it are viewed in the light most favorable to the government. See Glasser v. United States, 315 U.S. 60, 80 (1942); Burgos, 94 F.3d at 862. "[I]n the context of a criminal action, substantial evidence is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." Burgos, 94 F.3d at 862.

A. The Promotion Counts.

Counts 12, 13, 14, 16 and 17 charged that the Defendants violated 18 U.S.C. § 1956(a)(1)(A)(i). In order to sustain a conviction under the statute, the government must

prove: (1) the defendant conducted or attempted to conduct a financial transaction having at least a de minimis effect on interstate commerce or involving the use of a financial institution which is engaged in, or the activities of which have at least a de minimis effect on, interstate commerce, see United States v. Peay, 972 F.2d 71, 74 (4th Cir. 1992); (2) the property that was the subject of the transaction involved the proceeds of specified unlawful activity; (3) the defendant knew that the property involved represented the proceeds of some form of unlawful activity; and (4) the defendant engaged in the financial transaction with the intent to promote the carrying on of specified unlawful activity. See 18 U.S.C. §§ 1956(a)(1)(A)(i) and (c).

With respect to counts 12-14 and 16-17, the indictment essentially alleged that the Defendants' transfers of money fraudulently obtained from HLI through MPS to their non-medical businesses constituted financial transactions involving proceeds from a specified unlawful activity, namely wire fraud, conducted with the intent to promote the carrying on of wire fraud. The Defendants take issue with the sufficiency of the evidence with respect to the interstate commerce element and whether the Defendants conducted the transactions with the intent to promote wire fraud. We conclude the evidence is sufficient with respect to each of these elements and address each in turn.

The Defendants argue that evidence of a de minimis effect on interstate commerce is lacking, because the Promotion Counts only involved the intrastate transfers of funds. For example, Count 17 was premised on a check drawn on MPS's account at Signet Bank in Virginia in favor of Hawthorne Construction Excavators, Inc., a Virginia company. Although the Promotion Counts only involved the intrastate transfers of HLI line of credit funds, the record contains more than sufficient evidence to establish that those transfers had at least a de minimis effect on interstate commerce. Specifically, the evidence firmly established that the Defendants' transfers affected interstate commerce by

violating MPS's loan agreement with an out-of-state company, HLI.

Relying on United States v. Heaps, 39 F.3d 479 (4th Cir. 1994), and United States v. Jackson, 935 F.2d 832 (7th Cir. 1991), the Defendants argue that their unsecured transfers of funds to their non-medical businesses in no way "promoted" wire fraud. Rather, the Defendants contend that their unsecured transfers merely amounted to lifestyle expenditures. See Jackson, 935 F.2d at 841 (holding that defendant's expenditure of proceeds from drug sale on items used solely to maintain personal lifestyle did not "promote" specified crime of drug dealing).

We believe there is sufficient evidence of promotion. The Defendants understood that the use of financial transactions from MPS to the non-medical businesses was an essential part of their scheme to misapply funds fraudulently obtained from HLI. Otherwise, HLI would have transferred funds directly to the non-medical businesses. To avoid this result, MPS engaged in these transactions with the non-medical businesses to promote the overall scheme. Because the transfer of money from MPS to the non-medical businesses was integral to the success of the overall scheme, it is undeniable that these transactions were designed to promote the unlawful activity of wire fraud. That the transactions were part of the overall scheme to defraud or could form the basis of a wire fraud charge is of no consequence. Cf. United States v. Smith, 44 F.3d 1259, 1265 (4th Cir. 1995).

Furthermore, the facts here are materially distinguishable from the facts in Heaps and Jackson, the two cases relied upon by the Defendants. In Heaps, the promotion counts were based on payments for drugs to a drug dealer, who then placed the money in a box in his apartment. Heaps, 39 F.3d at 485. We held that the receipt of the proceeds of the drug deal could not also serve as the predicate of a promotion count. See id. at 485-86. Otherwise "virtually every sale of drugs would be an automatic money

laundering violation as soon as money changed hands." Id. at 485. Thus, in Heaps, we required that the money laundering transaction be separate and distinct from the underlying offense generating the money. In the present case, the promotion counts satisfy this requirement. They were predicated, not on the transfers into MPS's account, but rather on the transfers from MPS's account to their non-medical businesses, thus misappropriating HLI line of credit funds to infuse cash into those businesses.

Jackson is inapposite as well. In Jackson, the Seventh Circuit held that proof of the defendant drug dealer's purchase of a cellular telephone, making rental payments, and making out checks to cash with funds he obtained from the sale of drugs could not be viewed as promoting his drug dealing for purposes of § 1956(a)(1)(A)(i), because the government did not offer concomitant proof that these expenditures played some role in the defendant's drug dealing operation. Jackson, 935 F.2d at 841. In contrast to Jackson, in the present case the evidence links the transfer of the ill-gotten funds to the specified criminal activity. In the context of a fraud case such as we have here, when proceeds are used in a transaction to commit the next step in a scheme to defraud, it is clear that the financial transaction advances and furthers the progress of the next step. We, accordingly, reject the Defendants' challenge to the sufficiency of the government's proof that they engaged in the financial transactions at issue with the intent to promote the carrying on of wire fraud.

B. Concealment Counts.

Counts 18, 19, 20 and 21 charged that the Defendants violated 18 U.S.C. § 1956(a)(1)(B)(i). In order to sustain a conviction under that provision, the government must prove: (1) the defendant conducted or attempted to conduct a financial transaction having at least a de minimis effect on interstate commerce or involving the use of a financial

institution which is engaged in, or the activities of which have at least a de minimis effect on, interstate commerce, see Peay, 972 F.2d at 74; (2) the property that was the subject of the transaction involved the proceeds of specified unlawful activity; (3) the defendant knew that the property involved represented the proceeds of some form of unlawful activity; and (4) the defendant knew that the transaction was designed in whole or part, to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of the unlawful activity. See 18 U.S.C. §§ 1956(a)(1)(B)(i) and (c).

The government premised the Concealment Counts on the repayments from the Defendants' non-medical businesses to MPS, and the cover-up of the source of those repayments on MPS's books. According to the Defendants, the government's offer of proof on the Concealment Counts was deficient as to the first, second and fourth elements. Our review of the evidence reveals that sufficient evidence supports each of these elements.

With respect to the first or interstate commerce element, the record establishes that after each repayment, the Defendants faxed a "Loan Status Report" from MPS in Virginia to HLI in Maryland that reported the receipt of the repaid funds, but failed to disclose any source of the repaid funds. By failing to disclose the true source of these funds, each Loan Status Report gave HIL the false impression that the funds originated from legitimate medical businesses as required by the written loan agreement between MPS and HIL. Accordingly, we are more than satisfied that the repayments had at least a de minimis effect on interstate commerce.

With respect to the second element, the Defendants' convictions on Counts 18 through 21 will stand as long as the jury, viewing the evidence in the light most favorable to the government, could infer that the transfers into MPS's account "involved" wire fraud proceeds for purposes of § 1956(a)(1). To do so, the government need not prove that all

of the money involved in the transfers constituted the proceeds of wire fraud; it is sufficient if the government proves that at least part of the money represented such proceeds. See, e.g., United States v. Cancelliere, 69 F.3d 1116, 1120 (11th Cir. 1995); Jackson, 935 F.2d at 840; cf. United States v. Moore, 27 F.3d 969, 976-77 (4th Cir. 1994) (stating that 18 U.S.C. § 1957 does not require the government to trace origin of funds from sale of assets that were purchased with commingled illegally-acquired and legally-acquired funds). Furthermore, when the funds used in a particular transaction originated from a single source of commingled, legally- and illegally-acquired funds, it may be presumed that the transacted funds, at least up to the full amount originally derived from crime, were the proceeds of the criminal activity. Cf. Moore, 27 F.3d at 976 (holding same in context of 18 U.S.C. § 1957, the sister money laundering statute to 18 U.S.C. § 1956).

Viewing the evidence in the light most favorable to the government, we conclude that substantial evidence supports that the repayments represented, in part, the proceeds of the Defendants' wire fraud. The uncontradicted evidence at trial showed that each repayment derived from a commingled account, and that the amount of the repayment was less than the amount originally transferred as part of the Defendants' wire fraud. Therefore, the jury was entitled to presume that the repayments constituted the proceeds of the Defendants' wire fraud. Cf. Moore, 27 F.3d at 976-77.

With respect to the fourth element--that the Defendants knew the transactions were designed, in whole or part, to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of the unlawful activity, see 18 U.S.C. § 1956(a)(1)(B)(i) -- the Defendants argue there was insufficient evidence of structuring. See United States v. Gilliam, 975 F.2d 1050, 1056 (4th Cir. 1992) (stating that in a prosecution under § 1956(a)(1)(B)(i), the government must prove "a specific intent to structure a transaction so as to conceal the true

nature of the proceeds."). According to the Defendants, their doctoring of MPS's books to conceal the source of the funds transferred cannot count as their having "structured" the transactions because the transactions (the transfer of funds between bank accounts) had already been completed.

The Defendants' argument takes an overly narrow view of the term "transaction" as found in 18 U.S.C. § 1956(a)(1). Section 1956 defines "transaction," in relevant part, as including "a . . . transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, . . . transfer between accounts, . . . or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected." 18 U.S.C. § 1956(c)(3). The evidence, viewed in the light most favorable to the government, supports the jury's finding that the Defendants had a specific intent to structure their transactions so as to conceal or disguise the true nature and source of the repayments. The transactions here involved the Defendants' transfer of funds between bank accounts with the knowledge that the receiver of the funds, MPS, would doctor the books to conceal the true nature and source of the funds. The jury was entitled to infer that the Defendants would not have transferred the funds unless they knew that MPS would doctor the books upon receipt of the funds, and thus was entitled to find that the Defendants structured the transactions so as to conceal their true nature and source.

For these reasons, we reject the Defendants' challenge to the sufficiency of the government's proof with respect to the first, second and fourth elements on the Concealment Counts. In sum, we reject the Defendants' challenge to the sufficiency of the evidence supporting their money laundering convictions.

III.

The Defendants next seek reversal of their money laundering convictions, Counts 12-14 and 16-21, under

Federal Rule of Criminal Procedure 52(b), on the ground that the district court committed plain error by failing to charge the jury that the financial transactions that were the subject of the money laundering counts had to have either (1) had at least a de minimis effect on interstate commerce or (2) involved the use of a financial institution which is engaged in, or the activities of which have at least a de minimis effect on, interstate commerce. See 18 U.S.C. § 1956(c)(4); Peay, 972 F.2d at 74. Because the Defendants failed to note a timely objection at trial to the district court's failure to so instruct the jury, they are correct in asserting that we may only review for plain error. See United States v. Olano, 507 U.S. 725, 731 (1993); see also Fed. R. Crim. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

Under the plain error analysis clarified by the Supreme Court in Olano, an appellate court has the discretion to correct a forfeited error under Federal Rule of Criminal Procedure 52(b), where: (1) there is an error; (2) the error is plain; (3) the error affects substantial rights; and (4) the court determines, after examining the particulars of the case, that the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." See Olano, 507 U.S. at 732 (alteration in original) (internal quotation marks omitted).

We have no trouble in concluding that the first two prongs of the Olano test are satisfied here. "Proof of some effect on interstate commerce is essential to show" a violation of 18 U.S.C. § 1956. See Peay, 972 F.2d at 74. Here, the district court failed to instruct the jury on the interstate commerce element of the money laundering counts. Such failure constitutes error. See United States v. Forbes, 64 F.3d 928, 934 (4th Cir. 1995) (stating that the Sixth Amendment's right to trial by jury includes a right to have the jury make every factual finding essential to a conviction; thus, failure to instruct the jury that it must make

a finding on an essential element is constitutional error). The first prong of Olano, then, is satisfied. The holding of Peay requiring proof of a de minimis effect on interstate commerce is clear, satisfying the second prong of Olano, which requires that the error be plain. See Olano, 507 U.S. at 734 (explaining that the word "'plain'" is "synonymous with `clear' or, equivalently,`obvious'").

Unless we conclude that the jury necessarily made the required finding despite the failure to instruct, see, e.g., Forbes, 64 F.3d at 935, then we must conclude that the failure to instruct affected Conk's substantial rights, see United States v. David, 83 F.3d 638, 647 (4th Cir. 1996) ("[T]he failure to instruct on an element of the crime, where the jury never made the constitutionally required findings, is within that `special category' of forfeited errors, and satisfies Olano's third prong.").[2] The record before us gives no indication that despite the district court's failure to instruct, the jury necessarily found that the Defendants' conduct under the Promotion Counts had at least a de minimis effect on interstate commerce. For example, no other instruction encompassed the missing instruction. Accordingly, the third prong of Olano is satisfied.

We cannot conclude, however, that the fourth prong of Olano is satisfied because, after examining the particulars of this case, we cannot say that the forfeited error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." See Olano, 507 U.S. at 732 (alteration in original) (internal quotation marks omitted).

Recently, in Johnson, 117 S. Ct. at 1544, the Supreme Court concluded that Olano's fourth prong was not met under nearly identical circumstances. In Johnson, the district court

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[2] In Johnson v. United States, 117 S. Ct. 1544 (1997), the Supreme Court specifically did not address whether a failure to instruct on an essential element of a crime is an error that falls within the limited classes of errors that have been found to affect substantial rights. See id. at 1550. Thus, our decision in David remains good law on this point.

erroneously failed to submit the issue of materiality to the jury in a perjury prosecution under 18 U.S.C. § 1623. See id. at 1549. The Supreme Court assumed without deciding that the error affected Johnson's substantial rights, and thus assumed the third prong of Olano was met. See id. at 1549-50. The Supreme Court concluded that Olano's fourth prong was not met in the face of the following circumstances: (1) the evidence in the record of materiality was "overwhelming"; (2) the issue of materiality was essentially uncontroverted at trial and remained so on appeal; and (3) Johnson did not present a plausible argument, in either her brief to the Eleventh Circuit or her brief to the Supreme Court, that her false statement was immaterial. Id. at 1550.

Here, as previously stated, the record contains overwhelming evidence of an effect on interstate commerce with respect to the Promotion Counts and the Concealment Counts. With respect to the Promotion Counts, the evidence firmly established that the Defendants' transfers had at least a de minimis effect on interstate commerce by violating MPS's loan agreement with an out-of-state company, HLI. With respect to the Concealment Counts, the record firmly establishes that the transfers had a de minimis effect on interstate commerce by precipitating the faxing of Loan Status Reports from MPS in Virginia to HLI in Maryland falsely implying that the sources of the transfers were medical businesses. Furthermore, this evidence stands completely uncontradicted in the record. Moreover, that the Defendants' conduct as alleged in the money laundering counts had at least a de minimis effect on interstate commerce was completely uncontroverted at trial.

Finally, the Defendants have not offered any plausible argument that such evidence fails to establish the requisite effect on interstate commerce. As the Supreme Court concluded in Johnson, we conclude that this is not a case where we should exercise our discretion to correct a

forfeited error under Federal Rule of Criminal Procedure 52(b). See id. at 1550.

IV.

Next, Conk seeks reversal of his perjury conviction for making a false declaration during a civil deposition, Count 24, on the ground that the district court's instructions on this count constituted plain error under Federal Rule of Criminal Procedure 52(b). Specifically, Conk complains that the district court instructed the jury on the wrong crime and erroneously removed from the jury's consideration the issues of whether his alleged false declaration was material and under oath. Conk acknowledges his failure to object to these instructions. Thus, we examine the district court's instructions regarding perjury and consider whether Federal Rule of Criminal Procedure 52(b) entitles him to relief from his perjury conviction.

A. The District Court's Instructions Regarding Perjury.

To convict Conk of perjury under 18 U.S.C. § 1623(a) as alleged in Count 24, the government had the burden of proving beyond a reasonable doubt that Conk: (1) knowingly made a (2) false (3) material declaration (4) under oath (5) in a proceeding before or ancillary to any court of the United States. See 18 U.S.C. § 1623(a); cf. United States v. Friedhaber, 856 F.2d 640, 642 (4th Cir. 1988) (en banc) (perjury before a grand jury).[3] The third and fifth elements

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[3] In pertinent part, § 1623(a) provides:

> Whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration . . . shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1623(a).

deserve some elaboration in the context of this case. We have consistently held that in a § 1623 prosecution, the third or materiality element is met if the declaration at issue "`has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed.'" United States v. Dickerson, 114 F.3d 464, 466 (4th Cir. 1997) (perjury before grand jury) (quoting United States v. Littleton, 76 F.3d 614, 618 (4th Cir. 1996) (perjury before grand jury)). We have not had an occasion to apply this articulation of the materiality standard in the context of a prosecution for perjury during a civil deposition. Given that a deponent's testimony is not actually addressed to a decision-making body, this standard does not neatly apply when, as here, the defendant is charged with committing perjury during a civil deposition. We note that the Second Circuit has adopted a materiality standard for purposes of a§ 1623 prosecution for perjury during a civil deposition. See United States v. Kross, 14 F.3d 751, 754 (2d Cir. 1994). In the Second Circuit, a false statement during a civil deposition is material if a "truthful answer might reasonably be calculated to lead to the discovery of evidence admissible at the trial of the underlying suit." Id. The Fifth Circuit has adopted a similar standard. See United States v. Holley, 942 F.2d 916, 924 (5th Cir. 1991) (holding that in a § 1623 prosecution for perjury during a civil deposition, materiality is not limited to issues specifically raised at trial or evidence admissible at trial, but includes matters properly the subject of and material to a deposition under Federal Rule of Civil Procedure 26(b)(1)). The Sixth and Ninth Circuits have adopted a considerably higher standard of materiality in a§ 1623 prosecution for perjury during a civil deposition. See United States v. Clark, 918 F.2d 843, 846 (9th Cir. 1990), overruled on other grounds by United States v. Keys, 95 F.3d 874 (9th Cir. 1996), cert. granted and judgment vacated, 117 S. Ct. 1816 (1997); United States v. Adams, 870 F.2d 1140, 1146-48 (6th Cir. 1989). In the Sixth and Ninth Circuits, a false statement during a civil deposition is material if the

topic of the statement is discoverable and the false statement itself had the tendency to affect the outcome of the underlying civil suit for which the deposition was taken. Clark, 918 F.2d at 847; Adams, 870 F.2d at 1147. As we will explain later, it is not necessary in this case that we decide which among these standards we would adopt for our circuit.

The fifth prong requires that the declaration at issue be made in a proceeding before or ancillary to a court of the United States. We note that this prong is satisfied upon sufficient evidence that the defendant made the false statement during a deposition in a federal civil case. See United States v. McAfee, 8 F.3d 1010, 1013-14 (5th Cir. 1993) (holding that a deposition in a federal civil case is an ancillary proceeding within the meaning of 18 U.S.C. § 1623).

With the requirements of a § 1623(a) prosecution in mind, we now turn to survey the district court's instructions to the jury regarding perjury in the present case. The district court began its instructions to the jury regarding perjury by generally stating that § 1623 provides, in pertinent part, that "[w]hoever under oath in any proceeding before any court or grand jury of the United States knowingly makes any false, material declaration is guilty of a crime." (J.A. 253). The district court next attempted to break the statute down into the individual elements that must be proven. In doing so, the district court blended the essential elements of a § 1623(a) prosecution with a § 1621(1) prosecution. Section 1621(1) provides in pertinent part:

> Whoever--
>
> (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any

> written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; . . . is guilty of perjury . . . .

18 U.S.C. § 1621(1).

Specifically, the district court instructed the jury that in order to convict Conk of perjury as alleged in Count 24, it must be convinced that the government has proven each of the following beyond a reasonable doubt:

> First, that the defendant testified under oath in a proceeding for which a law of United States authorizes the administration of an oath. Second, the oath was administered by a qualified person. Third, the defendant knowingly made the false material statement detailed in the indictment. And fourth, that the defendant acted willfully and contrary to the oath that had been given.

(J.A. 253). The district court then instructed the jury as follows:

> Now, [t]he Court is required by law to decide under the essential element one, whether or not the proceeding which the defendant testified was one during which an oath may be administered, and under the essential element two whether the oath was given by someone qualified to administer oath. In this case there is no issue as to those two elements.

> With respect to the first element, the defendant took an oath to testify truthfully, the evidence shows, and there appears to be no dispute that the defendant appeared for purposes of a deposition in the civil case before this division of United States District Court in a case entitled Health Line, Inc[.] versus Medical Payment Services, Inc[.], MedPay. Thomas A. Wilkinson [and] Edward M. Conk . . . took an oath to testify truthfully. The Court will determine the second element, that is, the materiality as a matter of law.

(J.A. 253-54). The district court then instructed the jury on the particulars of the elements of falsity and acting knowingly. Finally, the district court concluded its perjury instructions by instructing the following:

> The false or fraudulent statement made must be related to a material fact. A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representations or statement in making the decision.
>
> This means that if you find a particular statement of fact to have been false, you must determine whether that statement was one that had a natural tendency to influence or was capable of influencing the examiner from pursuing his investigation, the resolution of an issue in dispute, any decisions of the court, or the outcome of the law suit.

(J.A. 256-57).

B. Were the instructions erroneous?

Having surveyed the district court's perjury instructions, we now turn to consider whether the errors in the instructions alleged by Conk warrant reversal of his perjury conviction pursuant to Federal Rule of Criminal Procedure 52(b).

1. The Substitute Instruction.

We have no trouble in concluding that the district court erroneously instructed the jury with respect to Count 24 to the extent that the district court substituted the elements of the crime of "Perjury generally," 18 U.S.C. § 1621, for the elements of the crime of "False declarations before a grand jury or court," 18 U.S.C. § 1623. As previously stated, to convict Conk of perjury under § 1623 as alleged in Count 24, the government had to prove that Conk (1) knowingly made a (2) false (3) material declaration (4) under oath (5) in a proceeding before or ancillary to any court or grand jury of the United States. See 18 U.S.C. § 1623(a). The district court's substitute instruction covered all of these elements except for the last one. On that element, the district court instructed that, in order to convict Conk of perjury, he must have made the allegedly false statement in a proceeding for which a law of the United States authorizes the administration of an oath rather than in a proceeding ancillary to any court or grand jury of the United States. Thus, the district court failed to instruct on an essential element of § 1623(a). This was error, and the error was plain. Thus, the first and second prongs of Olano are satisfied.
Again, unless we conclude that the jury necessarily made the required finding despite the failure to instruct, see, e.g., Forbes, 64 F.3d at 935, then we must conclude that the failure to instruct affected Conk's substantial rights, see David, 83 F.3d at 647. The record before us gives no indication that, despite the district court's failure to instruct,

the jury necessarily found that Conk made the allegedly false statement at issue in a proceeding before or ancillary to any court or grand jury of the United States. No other instruction encompassed the missing instruction. Moreover, any chance at inquiring whether the jury necessarily found that Conk made the allegedly false statement in a proceeding ancillary to any court or grand jury of the United States by finding that he made the allegedly false statement in a proceeding for which a law of the United States authorizes the administration of an oath is foreclosed by the district court's conclusive instruction on the latter issue. Accordingly, Olano's third prong is satisfied. See David, 83 F.3d at 647.

We now must consider whether the forfeited error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." See Olano, 507 U.S. at 732 (alteration in original) (internal quotation marks omitted). We conclude that it does not, because overwhelming evidence establishes that Conk made the declaration at issue during a proceeding ancillary to a court of the United States, specifically a civil deposition; such evidence stands uncontradicted in the record; Conk did not dispute this element below and does not do so on appeal; and finally, Conk fails to set forth a plausible argument that he did not make the declaration at issue during a proceeding ancillary to a court of the United States. Under these circumstances, the fourth prong of Olano is not satisfied, see Johnson, 117 S. Ct. at 1550, and thus, we will not reverse Conk's perjury conviction on this basis.

2. Conclusive Instruction Regarding Whether Conk Made The Alleged False Statement Under Oath.

We have no trouble in concluding that the district court's conclusive instruction that the false declaration at issue in Count 24 was made under oath satisfies the first three prongs of Olano. There is no doubt that an essential element of a § 1623(a) prosecution is that the defendant has

made the false declaration under oath. See Friedhaber, 856 F.2d at 642. The statutory text of § 1623(a) expressly requires that the false declaration have been made "under oath." 18 U.S.C. § 1623(a). Thus, the district court violated Conk's Sixth Amendment right to have a jury make every factual finding essential to his convictions when it instructed the jury that the government had conclusively established this element of the offense. See United States v. Johnson, 71 F.3d 139, 142-43 (4th Cir. 1995) (holding the district court's instruction to the jury that deprived the jury of the opportunity to make a factual finding on an essential element of the offense constituted Sixth Amendment violation). The error was plain, and because no other instruction appears to have neutralized the error, we conclude that the error affected Conk's substantial rights. See David, 83 F.3d at 647.

Again, however, we cannot conclude that the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." See Olano, 507 U.S. at 732 (alteration in original) (internal quotation marks omitted). First, the evidence on this issue is overwhelming in that Conk admitted at trial that he testified under oath at the civil deposition on July 10, 1991 as alleged in Count 24. Second, he does not argue the invalidity of this admission on appeal. Third and finally, we fail to conceive of a plausible argument that Conk did not make the declaration at issue under oath. Under these circumstances, we cannot say that Olano's fourth prong is satisfied. Accordingly, we will not reverse Conk's conviction on Count 24 on the basis of the district court's conclusive instruction that the alleged false declaration was made under oath. See Johnson, 117 S. Ct. at 1550.

3. Conclusive Instruction on Materiality.

Conk also complains that the district court committed plain error by removing the element of materiality from the jury. He points to the district court's instruction during final

instructions that "[t]he Court will determine the second element, that is materiality, as a matter of law." (J.A. 254). The government argues that this instruction does not constitute error because the district court subsequently instructed the jury that it had to make a finding on the issue of materiality and gave the jury the standard to apply in deciding the issue.

Again, we have no trouble in concluding that the conclusive instruction at issue satisfies the first three prongs of Olano. The law is settled that in a § 1623 prosecution, the issue of materiality must "be decided by the jury, not the court." Johnson, 117 S. Ct. at 1548. Accordingly, the district court's instruction to the jury that the court was responsible for deciding the issue of materiality with respect to Count 24 was error. Furthermore, we conclude the error is clear, and thus plain. See id. at 1549. Finally, we conclude the error affected Conk's substantial rights, because we cannot conclude that the jury made the constitutionally required finding of materiality. See David, 83 F.3d at 647. Despite the district court's subsequent instruction to the jury that it should decide the issue of materiality, without an instruction telling the jury to disregard the previous erroneous instruction, we cannot conclude that the jury failed to follow the previous erroneous instruction. See United States v. Varner, 748 F.2d 925, 927 (4th Cir. 1984); United States v. Walker, 677 F.2d 1014, 1016-17 n.3 (4th Cir. 1982) (stating that, with respect to directly conflicting final jury instructions, where one is clearly prejudicial and the other not, reversal is warranted, because the jury "might have followed the erroneous instruction").

Yet again, we are left to consider whether the last prong of Olano is met, and again, we conclude that it is not. On this record, there is simply no basis for concluding that the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." Olano, 507 U.S. at 732 (alteration in original) (internal quotation marks omitted). As set forth above, the standard of materiality in the context of a

civil deposition has not been finally determined in our circuit. However, we need not decide which among the differing standards we would adopt, because overwhelming evidence establishes that the nature of Conk's false declaration unquestionably meets the more stringent standard adopted by the Sixth and Ninth Circuits requiring that the topic of the declaration at issue be discoverable and have the tendency to affect the outcome of the civil suit involved. See Clark, 918 F.2d at 847; Adams, 870 F.2d at 1147. Here, the topic of Conk's false declaration was unquestionably discoverable and the false declaration itself undeniably had the tendency to affect the outcome of HLI's civil suit against MPS, Conk, and Wilkinson for breach of contract and fraud. Specifically, the evidence firmly establishes that HLI's civil suit was prompted in part by its discovery through an investigative audit that many of the health care companies listed on MPS's books were fictitious. Thus, it is beyond cavil that information regarding whether Conk had any knowledge of the fictitious name "American Surgical" as listed on MPS's books "appear[ed] reasonably calculated to lead to the discovery of admissible evidence" in HLI's civil suit. Fed. R. Civ. P. 26(b)(1). Furthermore, Conk's false denial of knowledge of "American Surgical" irrefutably had the tendency to affect the outcome of the civil suit in that, at a minimum, it had the tendency to exculpate him with respect to HLI's claims of fraud and breach of contract. Indeed, we would characterize the evidence of materiality in this case as overwhelming. A further factor weighing in favor of not recognizing the district court's erroneous mandatory instruction on materiality is that the evidence of materiality is uncontradicted. Beyond that, Conk did not dispute the materiality of the declaration at issue below, and he has failed to present a plausible argument of immateriality before this court. Again, we are faced with circumstances nearly identical to those found in Johnson, 117 S. Ct. at 1544, where the Supreme Court refused to recognize a district court's error in removing the element of materiality

from the jury, and again, we conclude that Olano's fourth prong is not satisfied.

We note that our conclusion is in accord with three of our sister circuits that have considered the satisfaction of Olano's fourth prong post-Johnson under essentially the same circumstances. See United States v. West Indies Transp., Inc., 127 F.3d 299, 306 (3d Cir. 1997), petition for cert. filed, ___ U.S.L.W. ___ (U.S. Dec. 5, 1997) (No. 97-931); United States v. Sassanelli, 118 F.3d 495, 499-500 (6th Cir. 1997); United States v. Knoll, 116 F.3d 994, 1001 (2d Cir. 1997). For example, the Third Circuit refused to correct an erroneous conclusive instruction on the element of materiality in a prosecution under 18 U.S.C. § 1546 for making a false statement on a visa. See West Indies Transp., 127 F.3d at 306. Analogizing to Johnson, the court concluded that Olano's fourth prong was not satisfied where the evidence of materiality was overwhelming and uncontroverted, and the defendants failed to present a plausible argument that their statements were not material. See id.

In conclusion, while the district court erred with respect to portions of its perjury instructions, none of its errors warrant reversal of Conk's perjury conviction under Federal Rule of Criminal Procedure 52(b). Accordingly, we affirm Conk's conviction on Count 24 for perjury in violation of § 1623(a).[4]

V.

The Defendants next contend that their conspiracy and wire fraud convictions should be reversed on the ground that the district court abused its discretion in admitting, over their objections, two portions of a chart summarizing HLI's loss as a result of their fraudulent activities. See United

[4] Conk also challenges his perjury conviction on the ground that the element of materiality is not supported by sufficient evidence. For the reasons just stated, we reject his challenge as being without merit.

States v. Ellis, 121 F.3d 908, 926 (4th Cir. 1997) (a district court's decision to admit evidence over an objection is reviewed for abuse of discretion).

The chart, known as Exhibit MF-4, listed two major categories of HLI loan activity, pre-discovery activity and post-discovery activity, and listed HLI's total loss resulting from Defendants' criminal actions at $3,668,550. Under post-discovery activity, the chart listed amounts attributable to: (1) "Post Default Interest (Prime + 4%)"; (2) "Collections from Doctors"; (3) "Collections from Wilkinson"; and (4) "Collections from Conk." (J.A. 483). The Defendants only take issue with the portions of the chart that listed the amount of "Post Default Interest" at $740,335 and "Collections from Doctors" at $1,917,698. According to the Defendants, these amounts should have been excluded, because the government did not offer underlying documentary evidence to support them. See Fed. R. Evid. 1006 ("The contents of voluminous writings, records, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.").

We need not decide whether the district court erred in admitting the portions of the chart containing the amounts at issue, because assuming arguendo that it did, our review of the record reveals that any error was harmless. See Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). Obviously, the government's point in introducing the summary chart was to show that the Defendants engineered a fraud on HLI that caused it an enormous financial loss. Even without counting the amount of "Post Default Interest" as a loss to HLI, the other figures on the chart revealed that HLI still suffered an enormous financial loss of nearly three million dollars. As for the

amount listed as "Collections from Doctors," the Defendants were not prejudiced by the jury's knowledge of this amount, because that figure only served to minimize HLI's loss. The critical flaw in Judge Widener's analysis in his dissenting opinion on this issue is that he treats the amount listed as "Collections from Doctors" as counting in the total loss figure of $3,668,550 sought to be proved by the government. In sum, the district court's admission of the challenged portions of the chart does not warrant reversal of the Defendants' convictions for conspiracy and wire fraud.

VI.

Conk next challenges the sufficiency of the evidence to support his conviction for bank fraud under 18 U.S.C. § 1344. A majority of the panel consisting of myself and Judge Widener agree that Conk's bank fraud conviction should be affirmed; however, we reach our decision for different reasons, which reasons are stated in our separate opinions arriving at the same result.

VII.

We next turn to the Defendants' challenge to the district court's refusal to grant them downward departures in their sentences from the applicable guideline ranges under the United States Sentencing Guidelines. We lack authority to review such a refusal when it rests upon a determination that a departure is not warranted. See United States v. Bayerle, 898 F.2d 28, 30-31 (4th Cir. 1990). However, we may review the decision of a district court not to depart when that determination is grounded upon a belief that it lacks the legal authority to depart. See id. at 31.

Our review of the record reveals that the district court's decision not to depart downward in the Defendants' sentences rested on its determination that a downward

departure was not warranted with respect to either defendant. Accordingly, appellate review is precluded.[5]

VIII.

In conclusion, we affirm all of the Defendants' respective convictions and their respective sentences.

AFFIRMED

WIDENER, Circuit Judge, concurring and dissenting:

I.

The defendants argue that they are entitled to a new trial on the conspiracy count (Count I) and wire fraud count (Count V) of the indictment.

While I concur in Parts II, III and IV of the opinion of the majority, and in the result obtained in Part VI thereof, as to Part V of the opinion I respectfully dissent. I would grant a new trial on the conspiracy and wire fraud counts.

Part V of the opinion mentions the questioned exhibit, MF-4, which lists two major categories of loan activity and the "total loss resulting [to Health Line] from

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[5] The Defendants also challenge their sentences on the ground that the district court should have made independent findings with respect to the application of the United States Sentencing Guidelines to the non-money laundering counts, which did not carry the highest offense levels. This challenge is without merit. Our review of the record reveals that the district court properly sentenced the Defendants in accordance with the Guideline section that specifies the procedure for sentencing a defendant in a multiple-count case. See USSG § 5G1.2.

We also note that the Defendants originally challenged the district court's restitution order. However, they have since abandoned that challenge, citing the doctrine of mootness.

Defendants' criminal actions at $3,668,550." Slip p. 24. Of the said sum of $3,668,550, post-default interest of $740,335 and collections from doctors of $1,917,698 were not supported by underlying evidence. This is acknowledged. Thus, the amount of the loss was overstated by the government by $2,658,033, or 72%, hardly an error of little consequence. Despite that, we hold such an error to be "harmless," slip p. 24, and the defendants were "not prejudiced," slip p. 25, stating that the "figure only served to minimize HLI's loss." Slip p. 25.

In my opinion, errors of such magnitude are not harmless and should not be belittled as not prejudicial. Far from merely serving to minimize HLI's loss, the figures show that the government overstated by 72% the figures underlying the key part of the trial which might well have, and probably did, affect the verdict.

Exhibit MF-4 was the centerpiece of the prosecution of this case; its gross inaccuracy should require a new trial.

II.

I have concurred in Part VI of the opinion only because the check in the amount of $410,425.56 was delivered to Med Pay a creditor which was owned by the defendants.

Under California Commercial Code § 9-306, the lien of the bank remained attached to the check, so the only risk of loss was the solvency of the transferee of the check.

Except in the very unusual circumstances of this case, I think the evidence would have probably been insufficient to support the verdict because, other than the self-dealing, there was no apparent risk of loss, the loan having been timely paid pursuant to an extension granted by the bank.

III.

I express no opinion on Part VII of the panel opinion. I think that such large parts of the convictions should be set aside that the defendants should be resentenced on all counts following a new trial.

NIEMEYER, Circuit Judge, concurring in part and dissenting in part:

I concur in the opinion of the majority except for part VI. On that part, I dissent.

I do not believe that diverting the proceeds of a check made payable to Day Dream Publishing in which the Bank of Montecito had a general security interest, defrauded the bank when the bank did not know of the existence of the check and did not act either in extending or maintaining credit in reliance on Day Dream Publishing's receiving the check. The defendants could just as well have cashed the Big B check and deposited its proceeds into a Day Dream Publishing account and then written a check in the same amount to themselves. The bank is not defrauded by the day-to-day checking activities of a generally secured borrower unless a particular condition of those activities forms the basis of the security and the bank relied on it. If cashing the check defrauded the bank, then we must conclude that all of the defendants' fraudulent activities did so. Accordingly, I would reverse the conviction on count 11.

HAMILTON, Circuit Judge, writing separately with respect to Part VI:

Conk's conviction for bank fraud must be sustained if there is substantial evidence to support it when the evidence and reasonable inferences from it are viewed in the light most favorable to the government. See Glasser, 315 U.S. at

80; Burgos, 94 F.3d at 862. As previously stated, "in the context of a criminal action, substantial evidence is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." Burgos, 94 F.3d at 862.

Title 18 U.S.C. § 1344 provides that:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice--
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the monies, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises; shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1344. Count 11 of the indictment charged Conk under § 1344(1) and § 1344(2). Specifically, Count 11 charged:

> On or about the 18th day of November, 1989, in Richmond, Virginia, in the Eastern District of Virginia and in Montecito, California, in the Central District of California, the defendant EDWARD M. CONK knowingly and willfully executed and attempted to execute a scheme and artifice to defraud the Bank of Montecito, and to obtain money and funds under the custody and control of the Bank of Montecito by means of false and fraudulent pretenses, representations, and promises in that defendant CONK, in order to

> repay the loans described in paragraph 3 of this count, caused customer check 255421 from Big B Discount Drugs payable to Day Dream Publishing Inc. in the amount of $410,425.56 to be endorsed directly over to MedPay and to be deposited into MedPay's account at Sovran in Richmond Virginia, thus impairing the Bank of Montecito's security interest in the above check from Big B.

(J.A. 57). The district court similarly charged the jury under both subsections. Where the indictment and instructions to the jury charged both subsections of § 1344, as was done in this case, Conk's bank fraud conviction may be sustained under either subsection. See United States v. Goldsmith, 109 F.3d 714, 716 (11th Cir. 1997) (sustaining bank fraud conviction only under first subsection of § 1344, even though indictment and instructions charged that the defendant's conduct violated both subsections).

In order to convict Conk of bank fraud pursuant to § 1344(1), the government in this case was required to prove that: (1) Conk knowingly executed or attempted to execute a scheme or artifice to defraud the Bank of Montecito of "any property interest," United States v. Mancuso, 42 F.3d 836, 845 (4th Cir. 1994), (2) which put the Bank of Montecito at an actual or potential risk of loss; and (3) that the Bank of Montecito was a federally insured financial institution, see United States v. Jacobs, 117 F.3d 82, 93 (2d Cir. 1997); United States v. Sapp, 53 F.3d 1100, 1102 (10th Cir. 1995). In order to convict Conk of bank fraud pursuant to § 1344(2), the government in this case was required to prove that: (1) Conk knowingly executed or attempted to execute a scheme or artifice to defraud the Bank of Montecito of monies or funds under the custody or control of the Bank of Montecito; (2) that the Bank of Montecito was a federally insured financial institution; and (3) that Conk participated in

the scheme by means of false or fraudulent pretenses, representations, or promises, which were material. See 18 U.S.C. § 1344(2).

Conk contends that his bank fraud conviction cannot be sustained under either subsection, because there is insufficient evidence to support a finding that he knowingly caused the Big B check to be endorsed in favor of MPS. In addition, with respect to the first subsection, he contends that his bank fraud conviction cannot be sustained, because the scheme did not attempt to deprive the Bank of Montecito of any property interest, and the Bank of Montecito was not put at any potential risk of loss as a result of the Big B check being endorsed in favor of MPS. With respect to the second subsection, he contends that his bank fraud conviction cannot be sustained, because the Big B check was not in the custody or control of the Bank of Montecito nor was a false or fraudulent pretense, representation, or promise involved.

After reviewing the sufficiency of the evidence with respect to § 1344(1), I conclude that sufficient evidence exists to sustain Conk's bank fraud conviction under § 1344(1). The record contains the following evidence on the issue of whether Conk knowingly caused the Big B check to be endorsed in favor of MPS: (1) the testimony of Day Dream Publishing's comptroller that although she did not specifically remember endorsing the Big B check issued on November 15, 1989 in favor of MPS, she knew that she would not have done so unless she had been ordered to do so; (2) evidence that Conk was a substantial owner of Day Dream Publishing, who controlled the company directly and through his son, Chip Conk; (3) a memorandum from Chip Conk dated October 11, 1989 to Wilkinson that lists a $497,250 account receivable of Day Dream Publishing from Big B with an expected receipt date of November 1, 1989 as collateral for expected loans from MPS totaling $330,000; (4) evidence that Conk and Wilkinson started MPS in order to financially aid their nonmedical businesses; (5) evidence that Conk and Wilkinson caused their non-medical

businesses to partially repay MPS for any funds advanced to them from MPS; and (6) evidence that Conk was the only meaningful link between Day Dream Publishing and MPS. Looking at this evidence in the light most favorable to the government and drawing all reasonable inferences in its favor, I conclude that a reasonable finder of fact could accept this evidence as adequate and sufficient to support the conclusion beyond a reasonable doubt that Conk knowingly caused the Big B check to be endorsed in favor of MPS. See Glasser, 315 U.S. at 80.

I now turn to consider whether Conk's causing the Big B check to be endorsed in favor of MPS, without the Bank of Montecito's knowledge, defrauded the Bank of Montecito of any property interest as is required to sustain a bank fraud conviction under § 1344(1). See Mancuso, 42 F.3d at 845. At trial, the government contended that Conk's endorsement of the Big B check deprived the Bank of Montecito of its security interest in the Big B account receivable and the proceeds thereof. Thus, it must be decided whether a security interest in an account receivable and the proceeds thereof constitute a property interest that will support a bank fraud conviction under § 1344(1).

It is well settled that the scope of a bank's property interests to be protected under the bank fraud statute "is to be construed fairly widely." Id. In keeping with this well-settled rule, in Mancuso, we held that a debtor's assignment of its rights to the proceeds of job contracts to a bank in exchange for the advancement of funds "f[e]ll within the universe of property that will support" a bank fraud conviction under § 1344(1). Id. In so holding, we relied on the fact that the rights to the proceeds of the contracts could be assigned, traded, bought or otherwise disposed. See id. The revolving security interest at issue in the case before us is one step removed from a straightforward assignment of rights to the proceeds of a contract or an account receivable, but not a step that makes a difference for purposes of § 1344(1). Rather than holding an absolute right to the proceeds of the

Big B account receivable, the Bank of Montecito held a right to acquire the proceeds in the event Day Dream Publishing defaulted on the Note. Like the absolute right to acquire the proceeds of an account receivable, the right to acquire the proceeds of an account receivable upon default of a note can be assigned, traded, bought, or otherwise disposed. The contingent nature of the latter right simply affects the value of the right, not its ability to constitute a property interest. In sum, I am constrained to conclude that the Bank of Montecito's revolving security interest in the Big B account receivable and the proceeds thereof constitute a property interest protected by § 1344(1).

Turning to the risk of loss issue, I note that the government's theory at trial on this issue was that Conk's causing the Big B check to be endorsed in favor of MPS alienated a significant portion of the Bank of Montecito's collateral, thus creating a potential risk that the collateral would not be available to satisfy the Note if necessary. Conk argues that the Bank of Montecito was never put at a risk of loss by endorsement of the Big B check in favor of MPS, because the Note was over collateralized and Mr. Tobes shared half of the risk of loss on the Note. In support, Conk points to an unaudited financial statement of Day Dream Publishing, dated September 30, 1989 showing six million dollars in current assets and eight million dollars in total assets.

I accept the government's theory. The government did not need to prove that Conk's causing the Big B check to be endorsed in favor of MPS created an actual risk of loss for the Bank of Montecito. See Jacobs, 117 F.3d at 93; Sapp, 53 F.3d at 1102. Rather, the government only needed to prove that Conk put the Bank of Montecito at a potential risk of loss. See id. After reviewing the evidence, I conclude the government met its burden. Specifically, the evidence established that the absence of the proceeds of the Big B account receivable from the assets of Day Dream Publishing meant a financial loss to the Bank of Montecito if Day

Dream Publishing defaulted on the Note and the other collateral available at the time of default was insufficient to satisfy the Note. The fact that the Note may have been overcollateralized at the time of the Big B endorsement and that the Bank of Montecito shared fifty percent of its ownership in the Note with Mr. Tobes did not change this fact. Thus, by definition, Conk's actions with respect to the Big B check put the Bank of Montecito at a potential risk of loss. For these reasons, I vote to affirm Conk's bank fraud conviction as supported by sufficient evidence.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

THOMAS A. WILKINSON, III
Defendant - Appellant

No. 96-4530
CR-95-68

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

EDWARD M. CONK
Defendant - Appellant

No. 96-4556
CR-95-68

Filed: April 17, 1998
[Entered: April 17, 1998]

ON PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

Appellants filed a petition for rehearing with suggestion for rehearing in banc.

Judge Hamilton and Judge Niemeyer voted to deny the petition for rehearing. Judge Widener voted to grant the petition for rehearing and would grant a new trial on the

conspiracy count (Count I) and the wire fraud count (Count V).

No member of the Court requested a poll on the suggestion for rehearing in banc.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Hamilton for the Court.

For the Court,

/s/ Patricia S. Connor
CLERK

UNITED STATES DISTRICT COURT
Eastern District of Virginia

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 3:95CR00068-001

Richard Cullen, Esquire
Defendant's Attorney

UNITED STATES OF AMERICA

V.

THOMAS A. WILKINSON, III

Filed: July 3, 1996
[Entered: July 3, 1996]

THE DEFENDANT:

[X] was found guilty on counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 12, 13, 14, 16, 17, 18, 19, 20, and 21 of the Indictment after a plea of not guilty.

Title & Section	**Nature of Offense**
18:371	Conspiracy
18:1343	Wire Fraud
18:1956(a)(1)(A)(i)	Money Laundering
18:1956(a)(1)(B)	Money Laundering

Date Offense Concluded	**Count Numbers**
06/21/95	1
06/21/95	2-9
06/21/95	12-14, 16 & 17

Date Offense Concluded	Count Numbers
06/21/95	18-21

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[X] The defendant has been found not guilty on count(s) 10, 15, 22 and 23 of the Indictment.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 246-76-4204

Defendant's Date of Birth: 10/12/47

Defendant's USM No.: 33796-083

Defendant's Mailing Address:

13760 Lintel Lane
Midlothian, Virginia 23113

Defendant's Residence Address:

13760 Lintel Lane
Midlothian, Virginia 23113

July 03, 1996
Date of Imposition of Judgment

/s/_____
Signature of Judicial Officer

Robert R. Merhige, Jr.
United States District Judge
Name & Title of Judicial Officer

July 03, 1996
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of SIXTY (60) MONTHS on each of Counts 1, 2, 3, 4, 5, 6, 7, 8 and 9 on each Indictment and EIGHTY-SEVEN (87) MONTHS on each of Counts 12, 13, 14, 16, 17, 18, 19, 20 and 21 of the indictment and, said terms of imprisonment shall be served CONCURRENTLY each with the other. THE TOTAL TERM OF IMPRISONMENT TO SERVE IS EIGHTY-SEVEN (87) MONTHS.

[X] The court makes the following recommendations to the Bureau of Prisons:

that the defendant serve his term of incarceration at F.C.I. Petersburg

[X] The defendant shall surrender service of sentence at the institution designated by the Bureau of Prisons.

[X] between 9:30 a.m. and 11:00 a.m. on August 05, 1996. Until such time, the defendant is continued on the same PR bond on the condition that he does not change his residential address without the permission of the Court or his counsel and on the condition that he remain in regular contact with his counsel.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS on each of Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 12, 13, 14, 16, 17, 18, 19, 20, and 21 of the Indictment and said terms of supervised release shall be served CONCURRENTLY each with the other.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime.

While on supervised release, the defendant shall not illegally possess a controlled substance.

While on supervised release, the defendant shall not possess a firearm or destructive device.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Financial Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the following additional conditions:

The defendant shall pay restitution IMMEDIATELY to Blue Cross/Blue Shield of Maryland in the amount of $1,662,658.00 and shall be liable jointly and severally with

his co-defendant, EDWARD M. CONK (see 3:95CR68-02), until paid in full.

The defendant shall not incur new credit card charges or open additional lines of credit without the approval of his probation officer.

The defendant shall provide his probation officer with access to requested financial information.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substance, except as prescribed by physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;
9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any

persons convicted of a felony unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11. the defendant shall notify the probation officer within seventh-two hours of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record of personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINANCIAL PENALTIES

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set out below.

Count	Assessment	Fine	Restitution
1, 2-9, & 12 14 and 16-21	$900.00	$20,000.00	$1,662,658.00
Totals:	$900.00	$20,000.00	$1,662,658.00

FINE

The fine includes any costs of incarceration and/or supervision.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the below payment options are subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

RESTITUTION

The defendant shall make restitution to the following persons in the following amounts:

Name of Payees	**Amount of Restitution**
Blue Cross/Blue Shield of Maryland	$1,662,658.00

Priority Order of Payment

Forthwith

Each restitution payment shall be divided proportionately among the payees named unless specified in the priority payment column above.

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

The total restitution, fine and special assessment shall be paid by the defendant:

[X] in full immediately.

Financial penalty payments are to be made to the Clerk of Court, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

UNITED STATES DISTRICT COURT
Eastern District of Virginia

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 3:95CR00068-002

Dennis W. Dohnal, Esquire
Defendant's Attorney

UNITED STATES OF AMERICA

V.

EDWARD M. CONK

Filed: July 3, 1996
[Entered: July 3, 1996]

THE DEFENDANT:

[X] was found guilty on counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21 and 24 of the indictment after a plea of not guilty.

Title & Section	**Nature of Offense**
18:371	Conspiracy
18:1343	Wire Fraud
18:1344	Bank Fraud

Date Offense Concluded	**Count Numbers**
06/21/95	1
06/21/95	2-9
06/21/95	11

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[X] The defendant has been found not guilty on count(s) 10, 15, 22 and 23 of the Indictment.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any changes of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 157-26-6728

Defendant's Date of Birth: 06/19/37

Defendant's USM No.: 33800-083

Defendant's Mailing Address:

3009 Marvillas Loop
Austin, Texas 78735

Defendant's Residence Address:

3009 Marvillas Loop
Austin, TX 78735

July 03, 1996
Date of Imposition of Judgment

/s/_____
Signature of Judicial Officer

Robert R. Merhige, Jr.
United States District Judge
Name & Title of Judicial Officer

July 03, 1996
Date

Title & Section	Nature of Offense
18:1956(a)(1)(A)(i)	Money Laundering-Promoting-Illegal Activity
18:1956(a)(1)(B)(i)	Money Laundering; Concealment
18:1623	Perjury

Date Offense Concluded	Count Numbers
06/21/95	12-14, 16 & 17
06/21/95	18-21
07/10/91	24

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of NINETY-NINE (99) MONTHS on each of Counts 12, 13, 14, 16, 17, 18, 19, 20 and 21 of the Indictment and SIXTY (60) MONTHS on each of Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 11 and 24 of the Indictment and, said terms of imprisonment shall be served CONCURRENTLY each with the other. THE TOTAL TERM OF IMPRISONMENT TO SERVE IS NINETY-NINE (99) MONTHS.

[X] The court makes the following recommendations to the Bureau of Prisons:

that as a first choice, the defendant serve his term of imprisonment at FPC Bastrop (Texas) and, as a second choice, the defendant serve his term of imprisonment at FPC Three Rivers (Texas).

[X] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[X] before between 9:30 a.m. and 11:00 a.m. on August 05, 1996. Until such time, the defendant is continued on the same PR bond on the condition that he remain in regular contact with his counsel and on the condition that he does not change his residential address without the permission of the Court or his counsel.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS on each of Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21 and 24 of the Indictment and said terms of supervised release shall be served CONCURRENTLY each with the other.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime.

While on supervised release, the defendant shall not iilegally possess a controlled substance.

While on supervised release, the defendant shall not possess a firearm or destructive device.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Financial Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the following additional conditions:

The defendant shall pay restitution IMMEDIATELY to Blue Cross/Blue Shield of Maryland in the amount of $1,662,658.00 and shall be liable jointly and severally with his co-defendant, Thomas A. Wilkinson, III (see 3:95CR68-01), until paid in full.

The defendant shall not incur new credit card charges or open additional lines of credit without the approval of his probation officer.

The defendant shall provide his probation officer with access to requested financial information.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. the defendant shall support his or her dependents and meet other family responsibilities;

5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substance, except as prescribed by physician;

8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any persons convicted of a felony unless granted permission to do so by the probation officer;

10. _the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11. the defendant shall notify the probation officer within seventh-two hours of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record of personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINANCIAL PENALTIES

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set out below.

Count	Assessment	Fine	Restitution
1-9, 11-14 16-21 & 24	$1,000	$50,000.00	$1,662,658.00
Totals:	$1,000	$50,000.00	$1,662,658.00

FINE

The fine includes any costs of incarceration and/or supervision.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the below payment options are subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

RESTITUTION

The defendant shall make restitution to the following persons in the following amounts:

Name of Payees	Amount of Restitution
Blue Cross/Blue Shield of Maryland	$1,662,658.00

Priority Order of Payment

Forthwith

Each restitution payment shall be divided proportionately among the payees named unless specified in the priority payment column above.

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

The total restitution, fine and special assessment shall be paid by the defendant:

[X] in full immediately.

All financial penalty payments are to be made to the Clerk of Court, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article III, § 2

The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers and Consuls; -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; -- to Controversies between two or more States; -- between a State and Citizens of another State; -- between Citizens of different States, -- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

18 U.S.C. § 1623. False Declaration Before Grand Jury or Court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28 United States Code) in any proceeding before or ancillary to any court or

grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both. . .

18 U.S.C. § 1956. Laundering of Monetary Instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity --

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

. . .

(B) knowing that the transaction is designed in whole or in part --

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity;

. . .

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

. . .

(c) As used in this section -

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of

currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree. . . .

18 U.S.C. § 3231. District Courts

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

Federal Rules of Criminal Procedure 12(b)(2). Pleadings and Motions Before Trial; Defenses and Objections

(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

. . .

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which

objections shall be noticed by the court at any time during the pendency of the proceedings) . . .

Federal Rules of Criminal Procedure 30. Instructions

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury

Federal Rules of Criminal Procedure 52. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.